

DISTRICT COURT DEPARTMENT OF THE TRIAL COURT



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STANDARDS OF JUDICIAL PRACTICE

CARE AND PROTECTION PROCEEDINGS

Committee on Care and Protection and CHINS Proceedings

Hon. Robert A. Belmonte (Marlborough), Chairperson
Hon. Monte G. Basbas (Newton)
William J. Chiaradonna, Catholic Charitable Bureau
(Boston)
Robert Bonner Clifford, Chief Probation Officer
(Middlesex Juvenile Probation District)
Hon. Robert V. Greco (Framingham)
Christina L. Harms, Esq. (Dept. of Social Services)
Hon. J. Dennis Healey (Peabody)
Hon. Marie O. Jackson-Thompson (Cambridge)
Joan M. McGrath (Office of the Commissioner
of Probation)
Hon. Paul V. Mullaney (Dudley)
Colleen A. Trainor, Probation Officer (Gardner)
Hon. Lewis L. Whitman (Quincy)

Deborah L. Propp, Administrative Attorney

Revised June, 1988

Administrative Office of the District Court



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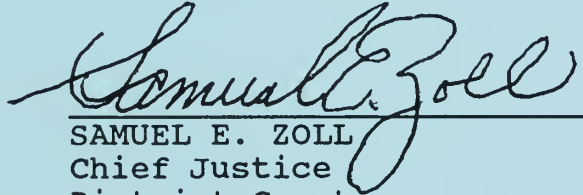
ADMINISTRATIVE REGULATION

No. 2-88

SUBJECT: PROMULGATION OF STANDARDS OF JUDICIAL PRACTICE

Administrative Regulation No. 2-88 is hereby promulgated as follows, to be effective forthwith:

The provisions of the Standards of Judicial practice applicable to Care and Protection Proceedings, as revised in May, 1988, are promulgated herewith for use in the District Court, in place of the original volume, which was promulgated on March 24, 1980, pursuant to Administrative Regulation No. 2-80.



SAMUEL E. ZOLL
Chief Justice
District Court

Promulgated: June 17, 1988

NOTE:

I am pleased to promulgate this newly-revised volume of District Court standards concerning the difficult and sensitive subject of care and protection proceedings. Since the original volume of care and protection standards was promulgated in 1980, a substantial body of appellate case law has developed. In addition, a number of statutory changes have been made.

These developments have brought additional guidance for judges hearing care and protection cases, but have also imposed new demands. Trial court judges' findings of fact are being scrutinized ever more closely on appeal, and judges are now required to issue written findings to support such non-adjudicatory actions as placement decisions and the denial of visitation. For children who are placed in substitute care, the judge's role has been expanded to follow the case beyond the commitment and into substitute care reviews.

Perhaps most importantly, we continue to be reminded by the Appeals Court and the Supreme Judicial Court of the special need to expedite these cases, to avoid delay whenever possible, and to

issue prompt adjudications. By their very nature, these cases are the most deserving and demanding of our close attention. Proceedings must be concluded as swiftly as justice will allow, so that the children who are the focus of the cases will not spend large portions of their childhood mired in uncertainty and "legal neglect," however well-intentioned it might be. These standards reflect this philosophy, and I urge all judges to keep these considerations foremost in their minds as they preside over these cases.

The Committee on Care and Protection and CHINS Proceedings has undergone a number of changes since the original volume was published. I want to offer my thanks to the chairperson of the committee, Hon. Robert A. Belmonte (Marlborough), and to the members of the committee: Hon. Monte G. Basbas (Newton), William J. Chiaradonna, Director of Operations and Administration for the Catholic Charitable Bureau, Robert Bonner Clifford, Chief Probation Officer (Middlesex Juvenile Probation District), Hon. Robert V. Greco (Framingham), Hon. J. Dennis Healey (Peabody), Hon. Marie O. Jackson-Thompson (Cambridge), Joan M. McGrath, Supervisor of Court Probation Services (Office of the Commissioner of Probation), Hon. Paul V. Mullaney (Dudley), Colleen A. Trainor, Probation Officer (Gardner), and Hon. Lewis L. Whitman (Quincy), and special thanks to Christina L. Harms, General Counsel for the Department of Social Services. Thanks also to Deborah L. Propp of this office who served as staff to the committee, and whose experience in these cases and superb drafting skills added immeasurably to the quality of the final product.

While not mandatory in application in the sense of rules, the Standards of Judicial Practice represent a qualitative consensus as to the various aspects of care and protection proceedings. Each court should strive for compliance with the standards and should treat them as a statement of desirable practice which should be departed from only for good reason. In addition, many references are made throughout the standards to provisions of statutory and case law which, of course, must be observed.

The standards may be amended from time to time. Your comments and suggestions on how they may be improved, and on particular practices which should be recommended therein, should be sent to the Administrative Office.

CARE AND PROTECTION PROCEEDINGS

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GENERAL

1:00 Purpose of the Standards

1:01 Purpose of Care and Protection Proceedings

Care and Protection Standards
Standard 1:00

1:00 Purpose of the Standards. THESE STANDARDS REPRESENT RECOMMENDED PRACTICES FOR CARE AND PROTECTION PROCEEDINGS IN THE DISTRICT COURT DEPARTMENT.

COMMENTARY

With the subject matter of care and protection proceedings being the future custody and well being of children, such proceedings are generally considered to be among the most difficult and sensitive matters to come before the District Court. Solutions are seldom perfect in this area. The objective is to insure that decisions are based on the most complete and accurate information available, and made in a setting in which all parties understand the nature of the proceedings. The difficulty of adjudicating care and protection petitions is complicated by the fact that, unlike other District Court matters which usually require proof that a disputed act or occurrence took place, deciding whether a parent is fit to further a child's best interests often calls for a judgment about an ongoing pattern of behavior and a wide range of conduct. The statutes provide little guidance in these cases.

The sensitive nature of the subject matter will remain, even after the adoption of these standards. However, it may be possible to at least reduce the procedural problems, if all participants in the proceedings are aware of the purpose and scope of each step of the proceedings and if all divisions follow the same procedure. The purpose of these standards, therefore, is to provide a framework for care and protection proceedings and to assist and inform those parties who have contact with the District Court in this area.

The standards refer to the Department of Social Services as the primary agency involved in care and protection proceedings.

Care and Protection Standards
Standard 1:01

1:01 Purpose of Care and Protection Proceedings. THE PURPOSE OF CARE AND PROTECTION PROCEEDINGS IS TO INSURE THAT THE CHILDREN OF THE COMMONWEALTH ARE PROTECTED FROM HARM RESULTING FROM ABUSE OR NEGLECT BY PARENTS OR PARENT SUBSTITUTES. THE COURT'S ROLE IS TO TAKE THE NECESSARY STEPS TO PROTECT THE CHILD, TO PROMOTE THE PROVISION AND ACCEPTANCE OF REMEDIAL SERVICES SO THAT THE CHILD MAY REMAIN IN OR BE RETURNED TO THE HOME, AND TO AUTHORIZE SUBSTITUTE CARE, AND EVENTUALLY A PERMANENT ALTERNATIVE TO PLACEMENT WITHIN THE HOME, WHEN THESE EFFORTS PROVE UNSUCCESSFUL.

COMMENTARY

Chapter 119 gives the court far-reaching powers which may have significant and lasting effects upon children and other family members. The interests at stake are so crucial as to invoke added procedural protections not commonly attendant to other types of civil cases, such as an elevated standard of proof (i.e. clear and convincing evidence), entitlement to counsel, and the requirement that judges issue detailed, written findings of fact to support their adjudications. (See Custody of a Minor (No. 1), 377 Mass. 876, 389 N.E.2d 68 (1979) as to the requirement of written findings.) It is therefore important that the court, when entering an order in a care and protection case, focus on the ultimate objective sought to be achieved by the filing of the petition. While the short-term aim is to protect the child from immediate danger, long-term goals must take into consideration the policy of the Commonwealth, as articulated in G.L. c. 119, s. 1, as appearing in the 1986 Official Edition:

It is hereby declared to be the policy of this commonwealth to direct its efforts, first, to the strengthening and encouragement of family life for the protection and care of children; to assist and encourage the use by any family of all available resources to this end; and to provide substitute care of children only

Care and Protection Standards
Standard 1:01 (Cont'd)

when the family itself or the resources available to the family are unable to provide the necessary care and protection to insure the rights of any child to sound health and normal physical, mental, spiritual and moral development.

The purpose of this chapter is to insure that the children of the commonwealth are protected against the harmful effects resulting from the absence, inability, inadequacy or destructive behaviour of parents or parent substitutes, and to assure good substitute parental care in the event of the absence, temporary or permanent inability or unfitness of parents to provide care and protection for their children.

With this policy in mind, it is clear that the care and protection process is best used as a vehicle by which to address existing problems within the family in order to allow the child to remain safely in the home. Substitute care is a remedy of last resort, to be used only when the parents refuse, or are unable to benefit from, remedial services or other resources, or when the parents are otherwise unable to care for the child.

COMMENCEMENT OF PROCEEDINGS

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Care and Protection Standards
Standard 2:00

2:00 Jurisdiction and Venue of the Courts. THE DIVISIONS OF THE JUVENILE COURT DEPARTMENT, OR THE JUVENILE SESSIONS OF ANY DIVISION OF THE DISTRICT COURT DEPARTMENT (EXCEPT THE DIVISIONS LOCATED WITHIN THE JUDICIAL DISTRICTS OF THE BOSTON, WORCESTER, BRISTOL, AND SPRINGFIELD DIVISIONS OF THE JUVENILE COURT DEPARTMENT), UPON THE PETITION OF ANY PERSON ALLEGING, ON BEHALF OF A CHILD UNDER THE AGE OF EIGHTEEN YEARS WITHIN THE JURISDICTION OF THE COURT, THAT THE CHILD IS WITHOUT NECESSARY AND PROPER PHYSICAL OR EDUCATIONAL CARE AND DISCIPLINE, OR IS GROWING UP UNDER CONDITIONS OR CIRCUMSTANCES DAMAGING TO THE CHILD'S SOUND CHARACTER DEVELOPMENT, OR LACKS PROPER ATTENTION OF A PARENT, GUARDIAN WITH CARE AND CUSTODY, OR CUSTODIAN, OR WHOSE PARENTS OR GUARDIAN ARE UNWILLING, INCOMPETENT OR UNAVAILABLE TO PROVIDE SUCH CARE, DISCIPLINE OR ATTENTION MAY ISSUE A PRECEPT TO BRING SUCH CHILD BEFORE THE COURT. G.L. c. 119, s. 24.

COMMENTARY

The above-referenced statute provides that the Juvenile Court and the juvenile sessions of the District Court, except those within Suffolk County and within the judicial districts of the Worcester, Bristol County and Springfield juvenile courts, have jurisdiction of care and protection petitions.

The only statutory requirement as to venue is that the child be "within the jurisdiction of said court" The proper venue, therefore, is wherever the child is present. It is emphasized that the child's domicile is not controlling. His or her physical presence is enough. In many instances, children are brought for care to hospitals or other helping agencies away from

Care and Protection Standards
Standard 2:00 (Cont'd)

the child's domicile. Should the child and his family be domiciled in an area outside of the judicial district in which the petition is brought, the court may wish to consider requesting the petitioner to begin further proceedings in the court of domicile, at which time the court receiving the initial petition should dismiss the original petition. In addition, the court should give consideration to dismissing a pending petition in favor of a new petition brought in the court of domicile if it appears that a proceeding in the latter court will facilitate the delivery of services to the child or the family. It should be noted, however, that a case cannot be "transferred" from one division to another. See Standard 8:00.

Care and Protection Standards
Standard 2:01

2:01 Who May File a Petition. GENERAL LAWS c. 119, s. 24

PROVIDES THAT A PETITION MAY BE FILED BY ANY PERSON.

COMMENTARY

It is recommended that "any person" be interpreted to include the right of a child himself to bring a petition for his own care and protection despite the fact that, traditionally, the law has required that legal proceedings on behalf of minors be begun by an adult as "next friend." Many states have recognized a "mature minor" rule which permits a minor to consent to his or her own medical care if he can comprehend the nature and consequences of the procedure involved. For a listing of such cases, see Baird v. Attorney General, 371 Mass. 741, 752, 360 N.E.2d 288, 295 (1977). See also G.L. c. 112, s. 12F. Extending the right of the mature minor to the care and protection area enables such a minor to protect his own health and well-being, and thus is in accord with those cases which extend the rights of minors in medical situations. See, for example, Baird v. Attorney General, supra, stating in dicta, at 754, 296:

[A]part from statutory limitations which are constitutional, where the best interests of a minor will be served by not notifying his or her parents of intended medical treatment and where the minor is capable of giving informed consent to that treatment, the mature minor rule applies in this Commonwealth. In such a case, although judicial involvement is not required, court approval may be sought, and, if it is, a judge may give effective consent to the performance of an operation or other treatment.

See also Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831 (1976), striking down a statute that created a parental veto over an unmarried minor's right to obtain an abortion.

The application of the mature minor rule to the care and protection area seems particularly desirable in view of the fact that the age limit for those who may be the subject of such a petition has been increased from under 16 years to under 18 years. See St. 1975, c. 276, s. 3. This interpretation is also consistent with DSS regulations, which allow mature minors in certain instances to voluntarily sign themselves into the Department's care for up to 72 hours, without parental consent. See 110 CMR 2.00 (32), 4.13.

Care and Protection Standards
Standard 2:02

2:02 Processing the Application. THE CLERK'S ROLE IN THE CARE AND PROTECTION CONTEXT IS A MINISTERIAL ONE, AS THERE IS NO AUTHORITY TO REFUSE TO ISSUE THE PETITION. UNLIKE COMPLAINANTS IN CRIMINAL MATTERS, PERSONS SEEKING TO FILE CARE AND PROTECTION PETITIONS MAY NOT BE DENIED THE RIGHT TO DO SO.

COMMENTARY

There is no step in the care and protection procedure equivalent to the probable cause determination that must be made before a criminal complaint may issue. Thus there is no step in the procedure whereby petitions can be "screened out" in the manner in which this can occur in criminal cases.

In those instances in which there is an obvious jurisdictional defect (e.g. the child has never been within the court's geographical boundaries), court personnel may call this to the applicant's attention and attempt to explain the problem.

Similarly, where it is clear that the facts alleged by the applicant do not fall within the statutory terms of G.L. c. 119, s. 24 (such as a "child" who is over the age of 18, or a problem having no relation to children or their caretakers), this will most likely become apparent in the process of attempting to complete the application form. Once either type of problem is explained to the person, the matter usually will be voluntarily withdrawn.

However, if the applicant persists, no attempt should be made to dissuade the person from filing a care and protection petition based upon any factual issues or questions as to the applicability of the law. Rather, the application should be completed as best as possible, the petition issued, and the matter eventually brought before the court. The respondents may then present any objections they may have to the issuance of the petition. Only the judge can interpret and apply the law and determine the facts.

Care and Protection Standards
Standard 2:03

2:03 Mandated Reporters within the Court System. JUDGES
SHOULD BE AWARE THAT G.L. c. 119, s. 51A REQUIRES CLERK-
MAGISTRATES AND PROBATION OFFICERS TO FILE REPORTS OF SUSPECTED
CASES OF CHILD ABUSE OR NEGLECT WITH THE DEPARTMENT OF SOCIAL
SERVICES.

COMMENTARY

Clerk-magistrates and probation officers, while operating within their professional capacity, are mandated reporters under G.L. c. 119, s. 51A. In addition, any other person may file a report if he or she has reasonable cause to believe that a child is suffering from abuse or neglect. It is therefore important, for several reasons, that all court personnel be familiar with the reporting requirements of the statute.

Probation officers may become aware of the possible existence of abuse or neglect while conducting an investigation or while interviewing a probationer on an unrelated matter. Similarly, information which indicates the possibility of a reportable condition may come to a clerk-magistrate's attention in the course of taking an application for a care and protection or CHINS petition, or in the context of a c. 209A or other proceeding. (See Standard 9:04, District Court Standards of Judicial Practice, Abuse Prevention Proceedings.)

Although most care and protection petitioners are either social workers or hospital or police personnel, and thus mandated reporters, lay petitioners will often be unfamiliar with the reporting provisions contained in s. 51A. Clerk-magistrates should inform such petitioners of the provisions of the statute concerning the filing of reports by non-mandated reporters, that the clerk-magistrate will be filing such a report (assuming that the allegations provide reasonable cause for the clerk-magistrate to believe that a reportable condition exists), and of the fact that the Department of Social Services is required, pursuant to s. 51A, to investigate and evaluate all reported information and to take additional measures as necessary. However, when the petition is filed by DSS or any other mandated reporter, these steps will not usually be necessary. (At times, the filing of a 51A report, especially by (prospective) lay petitioners, may be sufficient to resolve the situation and obviate the need for court intervention. See Standard 2:05.)

Care and Protection Standards
Standard 2:03 (Cont'd)

A s. 51A report may be filed simply by calling DSS and relating the allegations over the telephone. If a similar report has already been received, DSS may "screen out" the report, and no follow-up action will be required. If the call is not screened out, the Department will mail the caller a one-page form to be completed by the reporter and returned by mail.

General Laws c. 119, s. 51A, as appearing in the 1986 Official Edition, states:

Any physician, medical intern, hospital personnel engaged in the examination, care or treatment of persons, medical examiner, psychologist, emergency medical technician, dentist, nurse, chiropractor, podiatrist, osteopath, public or private school teacher, educational administrator, guidance or family counselor, day care worker or any person paid to care for or work with a child in any public or private facility, or home or program funded by the commonwealth or licensed pursuant to the provisions of chapter twenty-eight A, which provides day care or residential services to children, probation officer, clerk/magistrate of the district courts, social worker, foster parent, firefighter or policeman, who, in his professional capacity shall have reasonable cause to believe that a child under the age of eighteen years is suffering serious physical or emotional injury resulting from abuse inflicted upon him including sexual abuse, or from neglect, including malnutrition, or who is determined to be physically dependent upon an addictive drug at birth, shall immediately report such condition to the department by oral communication and by making a written report within forty-eight hours after such oral communication; provided, however, that whenever such person so required to report is a member of the staff of a medical or other public or private institution, school or facility, he shall immediately either notify the department or notify the person in charge of such institution, school or facility, or that person's designated agent, whereupon such person in charge or his said agent shall then become responsible to make the report in the manner required by this

Care and Protection Standards
Standard 2:03 (Cont'd)

section. Any such hospital personnel preparing such report, may take, or cause to be taken, photographs of the areas of trauma visible on a child who is the subject of such report without the consent of the child's parents or guardians. All such photographs or copies thereof shall be sent to the department together with such report. Any such person so required to make such oral and written reports who fails to do so shall be punished by a fine of not more than one thousand dollars.

* * *

In addition to those persons required to report pursuant to this section, any other person may make such a report if any such person has reasonable cause to believe that a child is suffering from or has died as a result of such abuse or neglect. No person so required to report shall be liable in any civil or criminal action by reason of such report. No other person making such a report shall be liable in any civil or criminal action by reason of such report if it was made in good faith; provided, however, that such person did not perpetrate or inflict said abuse or cause said neglect. . . .

* * *

The concurring opinion of Judge Brown in Comm. v. Labbe, 6 Mass. App. Ct. 73, 81, 373 N.E.2d 227, 233 (1978), merits attention:

I fully concur in the opinion of the court affirming the verdict of manslaughter. I note, however, that, most regrettably, none of the doctors or other persons involved in treating Jason on his several visits to the hospital emergency rooms between January and September, 1974, reported the possibility of abuse to the Department of Public Welfare as required by G.L. c. 119, s. 51A. [Footnote omitted.] Such a report could possibly have saved Jason's life.

Care and Protection Standards
Standard 2:03 (Cont'd)

A cause of action may lie in tort on behalf of a battered child against persons named in the statute for failure to report a probable case of child abuse, where subsequently there is further injury to the child. [Citation omitted.] In addition, an attending physician may be subject to personal liability for the consequences of any negligent failure to recognize the battered child syndrome. [Citation omitted.]

It is suggested that court personnel review the statute from time to time, as new categories of mandated reporters are periodically added to those already listed in s. 51A.

Care and Protection Standards
Standard 2:04

2:04 Administrative Procedure within the Court. IN THOSE COURTS WHERE ADEQUATE PERSONNEL ARE AVAILABLE, ONE PERSON IN THE COURT SHOULD BE DESIGNATED BY THE PRESIDING JUSTICE TO PROVIDE INFORMATION ON CARE AND PROTECTION MATTERS. THE CLERK-MAGISTRATE'S OFFICE SHOULD BE RESPONSIBLE FOR RECEIVING PETITIONS.

COMMENTARY

Care and protection matters, by definition, involve extremely sensitive problems. The subject matter is unlike any other that confronts a court, and the parties are often unfamiliar with judicial proceedings. For these reasons, it is helpful if, in courts where the personnel is available, one person in the court is designated by the Presiding Justice to be in charge of care and protection matters and to assist with procedural issues. When any person calls or comes to the court with a care and protection question, he should be directed to that person. (Note, however, that, consistent with District Court policy, non-judicial personnel are not to provide legal advice. See District Court Bulletin No. 6-76, Item 6, May 12, 1976.)

Such designation is beneficial to the court as well as the family and the child. If one person is in charge of assisting in these matters, that person will have, or will develop, expertise that will enable him or her to better assist the public. The designation of one person may also help to establish the special attention care and protection matters deserve from court personnel.

Care and Protection Standards
Standard 2:05

2:05 Alternatives to Filing a Petition. PRIOR TO THE FORMAL RECEIPT OF A CARE AND PROTECTION PETITION, THE CLERK-MAGISTRATE MAY ASSIST THE APPLICANT BY REFERRING HIM TO THE PERSON DESIGNATED AS IN CHARGE OF CARE AND PROTECTION MATTERS (SEE STANDARD 2:04).

COMMENTARY

There are situations in which it may appear to the clerk-magistrate that, in lieu of court action, a particular matter may be appropriate for resolution by a social service agency, by the Department of Social Services, or in some other suitable manner. If one person in the clerk-magistrate's office or in the probation office handles all care and protection matters, as recommended by Standard 2:04, experience with these problems over a period of time will help enable that person to ascertain which matters are best suited for alternative resolution. Such situations are primarily those where the petitioner is a private party, where it is clear that there is no immediate danger to the child in remaining in his present environment, and where the family has not yet been assisted by a social welfare agency or reported to the Department via a s. 51A report. Pursuing the full formalities of the court process in such situations may be premature, as it is unlikely that anyone is actually benefited by a court hearing in such circumstances. Contact with a local social service agency or the filing of a s. 51A report may best resolve the situation.

If the petitioner is unaware of the s. 51A procedure or of the availability of services to assist the family (which may either be voluntarily requested or offered as a result of the s. 51A investigatory process), the court can assist the petitioner by offering this information as a possible alternative to formal court proceedings. Accordingly, in such cases it is recommended that it be suggested that the petitioner contact a local social service agency. A list of available offices with telephone numbers should be kept in the courthouse for this purpose. The clerk-magistrate should not, however, attempt to dissuade a person from filing a petition if the person is so inclined. Once a written petition is filed, a precept may be issued, and a notice and summons are mandated. See G.L. c. 119, s. 24. An oral statement, however, is not a petition.

2:06 Applicable Court Rules. THE MASSACHUSETTS RULES OF CIVIL PROCEDURE DO NOT APPLY TO CARE AND PROTECTION CASES. PROCEDURE IS LARGELY DICTATED BY THE TERMS OF G.L. c. 119.

COMMENTARY

The Massachusetts Rules of Civil Procedure, by their terms, do not apply to care and protection matters. (See Rule 81(a), Mass. R. Civ. P.) Much of the initial procedure is, however, specifically prescribed by Chapter 119.

Other court rules apply to various stages of the proceedings. Uniform Trial Court Rule IV requires that an affidavit of related pending or concluded care or custody proceedings be filed at the start of every care and protection or similar action. Uniform Trial Court Rule VI pertains to substitute care reviews conducted under G.L. c. 119, s. 29B. (See Standard 6:03.) Finally, the Interim Supplemental Rules of Appellate Procedure in Care and Protection Cases (ISRAP) govern the early stages of care and protection appeals. Later stages of appellate proceedings (and any earlier appellate procedures which are not governed by ISRAP) are governed by the Massachusetts Rules of Appellate Procedure. (See Standard 6:05.)

As to procedures on interdepartmentally consolidated cases, see Standard 9:00.

Care and Protection Standards
Standard 2:07

2:07 Emergency Action. BOTH THE COURT AND THE DEPARTMENT OF SOCIAL SERVICES ARE AUTHORIZED TO TAKE EMERGENCY ACTION WHEN THERE IS REASONABLE CAUSE TO BELIEVE THAT REMOVAL IS NECESSARY TO PROTECT THE CHILD.

COMMENTARY

General Laws c. 119, s. 24 authorizes emergency court orders transferring custody of a child if the court is satisfied that there is reasonable cause to believe that the child is suffering from, or is at risk of, serious abuse or neglect and that immediate removal is necessary to protect the child from serious abuse or neglect. Before such an order may be issued there must be a recitation under oath by the petitioner of the "facts of the condition of the child" It is noted that the statutory requirement in this situation is different from that in an ordinary petition for care and protection in which the petition may contain only general allegations. Custody of the child may be transferred to the Department of Social Services; to any individual who, after study by a probation officer or other person or agency designated by the court, is found by the court to be qualified to give care to the child; or to any agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child. The statute further provides that such an emergency transfer of custody may not exceed 72 hours.

Whenever custody is to be transferred to the Department or to its agent, the court should, if possible, issue the "reasonable efforts" certification required by G.L. c. 119, s. 29C. However, failure to do so will not preclude the court from making a valid order.

General Laws c. 119, s. 29 requires the appointment of counsel for the child and the parent, guardian or custodian, at all hearings. Said statute also provides, however, that "[n]otwithstanding the provisions of this section, the court may make such temporary orders as may be necessary to protect the child and society." Accordingly, emergency orders may be issued in the absence of counsel. (But see Standard 2:08.)

When an emergency order is entered, G.L. c. 119, s. 24 requires that a date for a hearing on the extension of the order be set, which date "shall fall within the seventy-two hour

Care and Protection Standards
Standard 2:07 (Cont'd)

period." Written notice of the issuance of the emergency order, the reasons therefor, the hearing date and time, the right of the respondent to be represented by counsel and to have counsel appointed if the respondent is indigent, should be given to the parent or guardian with care and custody of the child, and such other person, if any, as had custody at the time of the entry of the emergency order. If possible, written findings which document the need for the emergency order should be issued. (See Standard 3:05.)

Clearly, this type of emergency order is to be used sparingly. There are times, however, when the circumstances require immediate action to protect the child.

Many times judges are requested to enter emergency custody orders by telephone when court is not in session. Although there may be sound moral and public policy reasons for entering these orders, the orders do not appear to qualify as emergency orders under G.L. c. 119, s. 24. General Laws c. 119, s. 51B, discussed more fully below, is designed for use in emergency situations when court is closed.

Telephone orders may be granted pursuant to G.L. c. 119, s. 51C to a physician or hospital if the conditions of said statute are met. The statute, as appearing in the 1986 Official Edition, provides:

If a parent or other person requests the release from a hospital of a child reported pursuant to section fifty-one A, the presiding judge of the juvenile court or the district court of the judicial district in which such hospital is located may, if he believes such release would be detrimental to the child's health or safety, authorize the hospital and the attending physician, by any means of communication, to keep such a child in the hospital until custody is transferred to the department or until a hearing may be held relative to the care and custody of such child.

Any other physician treating a child reported pursuant to section fifty-one A may be so authorized by the court to keep such child in his custody until such time as the custody of the child has been transferred to the department or until a hearing may be held relative to the care and custody of such child.

Care and Protection Standards
Standard 2:07 (Cont'd)

It is noted that the "presiding judge" is the one authorized to act by the above section. It may be argued that the term "presiding judge" was intended to refer to the "first justice." (The senior justice in length of full-time service is the "first justice." See G.L. c. 218, s. 6.) The interpretation of "presiding judge" should not be limited to the first justice of the court, however, as such an interpretation would yield an impractical result in emergency situations when a judge other than the first justice is more readily available. The better practice would be to interpret the phrase as referring to any judge who is presiding or sitting in a particular court at the time of the phone call made pursuant to s. 51C. Note that s. 51C does not give a judge the authority to authorize treatment, but merely to prevent a child in a hospital from being released.

General Laws c. 119, s. 51B(3) authorizes the Department of Social Services to take immediate temporary custody of a child without prior court approval if the Department has reasonable cause to believe that the removal of the child is necessary to protect the child from further abuse or neglect. The Department must make a written report stating the reasons for such removal and must file a care and protection petition on the next court day. (Although the use of s. 51B(3) is not restricted to emergencies which develop when court is closed, it is most frequently used in those instances.)

Following the issuance of an emergency order and the 72-hour hearing, the case would continue as any other care and protection proceeding, with an investigation and further hearings and orders. (In these situations, however, it is not necessary to hold the separate preliminary hearing that would normally follow the issuance of a non-emergency petition, as described in Standards 3:00 and 3:01. The court should instead take the actions specified in Standards 3:00 and 3:01 at or before the time of the 72-hour hearing.) The temporary custody order may continue in effect until the hearing on the merits.

On a related subject, the Supreme Judicial Court has considered the propriety of issuing court orders permitting DSS entry into homes to facilitate the conduct of G.L. c. 119, s. 51B investigations by the Department. In the 1986 case of Parents of Two Minors v. Bristol Division of the Juvenile Court Department, 397 Mass. 846, 494 N.E.2d 1307, the Department had received a s. 51A report and was refused access to the home by the parents. Although no care and protection petition was filed, DSS sought and obtained an order requiring the parents to permit such entry into their home. The SJC held that the Juvenile Court had no inherent or statutory authority to order the parents to submit to a non-emergency home visit by a DSS employee.

Care and Protection Standards
Standard 2:07 (Cont'd)

The court, in discussing the concept of inherent power, emphasized that for a court to invoke such power, the order to be issued must be in furtherance of the court's ability to carry out its functions as a court, rather than for the benefit of some other party or entity (such as DSS). (Id. at 853, 494 N.E.2d at 1311.) The court did not, however, address the question of whether there might be authority to issue such an order in a situation characterized as an "emergency" (such as one arising under s. 51B(3)), or during the course of an ongoing care and protection case.

Care and Protection Standards
Standard 2:08

2:08 Appointment of Counsel. IN CARE AND PROTECTION CASES, BOTH CHILDREN AND PARENTS HAVE A STATUTORY RIGHT TO BE REPRESENTED BY COUNSEL AT ALL HEARINGS. IF THE PARENTS CANNOT AFFORD TO EMPLOY AN ATTORNEY, THE COURT SHOULD APPOINT COUNSEL AT THE EARLIEST OPPORTUNITY.

COMMENTARY

General Laws c. 119, s. 29 provides that whenever a child is before a court in a care and protection proceeding, ". . . said child shall have and shall be informed of the right to counsel at all hearings, and if said child is not able to retain counsel, the court shall appoint counsel for said child. The parent, guardian or custodian of such child shall have and shall be informed of the right to counsel at all hearings . . . and if said parent, guardian or custodian of such child is financially unable to retain counsel, the court shall appoint counsel for said parent, guardian or custodian. Notwithstanding the provisions of this section, the court may make such temporary orders as may be necessary to protect the child and society."

Pursuant to the above statute, the court must appoint counsel for the child and counsel for the parent at the first opportunity, unless the parent knowingly waives the right to counsel. Attorneys for both the child and the parent are to be present at all hearings. Despite the requirement of the appointment of counsel, it is noted that the court may make temporary orders "as may be necessary to protect the child and society" even in the absence of counsel.

When a summons is sent to the parents, guardian or custodian following the filing of a petition, it should be noted thereon that they have a right to be represented by counsel, that it is advisable that they obtain counsel to represent them at the preliminary hearing and that if they are financially unable to do so they should contact the probation office at once. The telephone number should be included. In cases in which the parents, guardian or custodian waives the right to counsel, the record should clearly note such waiver. It is recommended that parents sign a waiver form if they do not wish to be represented by counsel after being advised of this right. In general, counsel for the parents is to be appointed when the parties are first before the court at the preliminary hearing, as it is not

Care and Protection Standards
Standard 2:08 (Cont'd)

possible to determine until such time whether appointment of counsel is necessary, unless the parents have contacted the court.

However, counsel for the child should be appointed and notified of the appointment as soon as possible after the filing of the petition to allow sufficient time to become familiar with the case, contact the client (if appropriate), and participate in the preliminary hearing in a meaningful way. As with the appointment of counsel for parents, the court should attempt to select someone whom it knows would be willing to promptly see the client, interview knowledgeable others about the case, and diligently and aggressively advocate for the client's interests. This is particularly important because parents (and, presumably, children) are entitled not only to counsel, but to effective assistance of counsel. See Care and Protection of Stephen, 401 Mass. 144, 514 N.E.2d 1087 (1987).

When an emergency order transferring custody is made without prior notice to the parents, it is suggested that the court appoint counsel for the child and the parents immediately after entering the order, if possible, so that these parties may be represented at the 72-hour hearing. If this is not possible, counsel for the child should be appointed as soon thereafter as possible, as should counsel for the parents, if only on a "tentative" basis, pending confirmation that the parents want, and are financially entitled to, appointed counsel. Additionally, the clerk's office should immediately telephone any attorneys appointed in this manner to notify them of the appointment and of the order of custody, as mailed notice will not be received in time to insure counsel's presence or participation at the 72-hour hearing.

Emergency custody orders are followed by notice to the parents to appear in court. It is suggested that this notice also inform parents of their right to be represented by counsel, as on the summons.

When the interests of the parents, whether or not husband and wife, or the interests of any of the child's custodians differ, counsel should be appointed for each of, or all, such persons. Similarly, if siblings have varying interests, counsel should be appointed for each sibling.

It is to be noted that there is no statutory authority for the court to appoint and order payment for counsel for the petitioner (agency or individual). See G.L. c. 119, s. 29. However, any party may, of course, be represented by counsel at his or her own expense.

Care and Protection Standards
Standard 2:09

2:09 Scheduling. ALL CARE AND PROTECTION HEARINGS SHOULD BE SCHEDULED PROMPTLY AND HEARD THROUGH COMPLETION WITHOUT EXCESSIVE DELAYS OR INTERRUPTIONS.

COMMENTARY

In situations involving the issuance of an ex parte emergency custody order pursuant to G.L. c. 119, s. 24, the statute directs the court to hold a hearing on the extension of the custody order within the next 72 hours. However, no timeframe is provided for non-emergency matters. It is therefore suggested that the preliminary hearing be scheduled no later than 14 calendar days following the filing of a non-emergency petition. (See Standard 3:00.) In both emergencies and non-emergencies, the initial hearing (either 72-hour or preliminary) should be conducted as continuously as possible until its conclusion, with day-to-day hearings if necessary. If a custody order is to be entered or extended as a result of the hearing, the court should make written findings which justify and explain the reasons for the order. This will not only satisfy the requirements of case law (see Custody of a Minor (No. 1), 377 Mass. 876, 389 N.E.2d 68 (1979)), but will also help to provide a framework for later case developments. See, also, Standard 3:05.

Chapter 119, s. 38 provides that all care and protection hearings must be closed to the general public, and makes it unlawful to publish the names of persons appearing before the court in such proceedings. These cases should be scheduled separately from the criminal calendar. In addition, the sensitive nature of these proceedings makes it desirable that the participants be separated from the general population of the courthouse. Accordingly, an attempt should be made to have care and protection cases scheduled on certain days of the week and set at certain hours reserved for this purpose, if possible.

In those courts where it is feasible, experiments scheduling individual care and protection matters at specific times are also recommended. This type of scheduling avoids keeping the parties waiting and reduces the strain on infants, very young children and anxious parents. Such scheduling may also serve to reduce costs by not detaining the social worker, other witnesses, and attorneys for several hours for a hearing.

It is further suggested that attempts be made to preserve some measure of confidentiality for the participants, as required

Care and Protection Standards
Standard 2:09 (Cont'd)

by s. 38, by using a numbering system to refer to each case instead of announcing the names of the parties when the case is being called, publishing and posting schedules with case names, and so forth.

Since the parties may be unfamiliar with judicial procedures, extra care should be taken to ascertain that the parents are notified of the hearing date, particularly if the date is changed after it has been set in open court. It is most unfortunate to have the parents appear with their witnesses only to learn that the hearing has been postponed and that their time and effort has been misspent. Written notice of all hearing dates should be sent to all parties who have filed an appearance.

Despite the fact that efforts should be made to help the participants in the proceedings to relax, the proceedings should be conducted in the courtroom, preferably the juvenile session, rather than an informal setting such as the judge's chambers or a conference room. Such proceedings, whether a trial, review, or other type of court appearance, must be tape recorded. (Interim Supplemental Rules of Appellate Procedure in Care and Protection Cases, Rule 5, and Special Rules of the District Court, Rule 211(A)(1).) As such a recording is necessary to preserve a record for appellate or other purposes, care should be taken to preserve the cassette or tape reel so that the tapes are not subsequently destroyed prior to appeal. As care and protections often remain active for several years, it would be wise for judges involved in such protracted cases to consider requesting the clerk-magistrate to preserve the tapes beyond the usual 2 ½ year retention period provided for in Special Rule 211(A)(4). Stenographic transcripts may be helpful as an additional means of recording the proceedings, but it is suggested that this be used in addition to, rather than in lieu of, tape recording. (Note, however, that in cases where both a tape and a transcript of a court-approved stenographer exists, it is unclear which would constitute the official record on appeal.)

Care and Protection Standards
Standard 2:10

2:10 Assignment of Judges. IT IS RECOMMENDED THAT, WHENEVER POSSIBLE, THE SAME JUDGE HEAR AN ENTIRE CARE AND PROTECTION MATTER. WHERE CIRCUMSTANCES PERMIT, EACH FIRST JUSTICE SHOULD DESIGNATE A REGULARLY-ASSIGNED JUDGE TO SPECIALIZE IN THESE CASES.

COMMENTARY

Continuity of judges is particularly important in care and protection matters. From the judge's perspective, these cases are among the most important matters which he or she hears and it is imperative that the person familiar with the background of the case and responsible for any prior orders continue to hear the remainder of the case. The institution of the substitute care review system, which increases and sometimes prolongs judicial involvement in these matters, has made the need for continuity even more pressing. See G.L. c. 119, s. 29B and Standard 6:03. It is important to keep in mind that the removal of a child from a parent's custody should only be considered to be the start, not the end, of a care and protection case. Once a child has been removed, efforts must be made to alleviate the problems in the home which first brought the child to the court's attention, and if this is not possible, to promptly develop an alternate permanent plan for the child. From this standpoint, it is clear that unless the same judge follows the case from beginning to end, these efforts at permanency planning will not be maximized.

From the perspective of the parties, it is often unsettling to see a different judge each time the case is heard. The appearance of the same judge, one who is familiar with the facts of the matter, should help to instill confidence in the parties. Therefore, it is recommended that every effort be made to have the same judge sit on the initial care and protection proceeding and any continuation (including substitute care reviews) thereof. This likewise dictates against the use of visiting or temporarily-assigned judges in individual care and protection cases. (If, however, it is necessary to assign a case to a visiting judge, it would be best to do so well in advance, if possible.)

In those courts where it would be practicable, it is further suggested that the Presiding Justice designate at least one judge who is usually assigned to the court to specialize in care and

Care and Protection Standards
Standard 2:10 (Cont'd)

protection cases and to hear all such cases brought in the particular court. (The Presiding Justice may wish to personally assume this responsibility.) In this way, the designated judge(s) can develop the expertise that is required to handle these complicated and delicate matters. Whether or not the Presiding Justice designates another judge as the court's care and protection specialist, however, the Presiding Justice has the overall responsibility for managing the care and protection caseload (as with other types of cases), and should remain generally informed as to its status. At a minimum, this would require periodic inspection for any cases which have been pending without adjudication for unreasonably lengthy periods, and ensuring that substitute care reviews are being conducted as required by law. (See Standard 6:03.)

PRELIMINARY HEARING

- 3:00 Preliminary Hearing: Definition and Scheduling
- 3:01 Preliminary Hearing: Nature
- 3:02 Appointment of Investigator
- 3:03 Guardian ad litem
- 3:04 Substitution of Parties
- 3:05 Temporary Orders

Care and Protection Standards
Standard 3:00

3:00 Preliminary Hearing: Definition and Scheduling. THE TERM "PRELIMINARY HEARING" IS USED HEREIN TO REFER TO THE FIRST APPEARANCE BEFORE THE COURT OF THE PARENTS AND THE CHILD FOLLOWING THE FILING OF A NON-EMERGENCY PETITION. THE PRELIMINARY HEARING SHOULD BE SCHEDULED PROMPTLY.

COMMENTARY

General Laws c. 119, s. 24 provides that, upon petition, the court "may issue a precept to bring such child before said court, shall issue a notice to the department [of social services], and shall issue summonses to both parents of the child to show cause why the child should not be committed to the custody of the department or other appropriate order made." To avoid confusion, this initial appearance required by the precept (if any) and summons should be referred to as the preliminary hearing. (Although it is sometimes termed the "show cause" hearing, this term is misleading, as it could be taken to refer to a hearing on whether the petition should issue, and could mistakenly imply that these are criminal proceedings.) It is also common to identify the child, as required by s. 26, at or shortly after the preliminary hearing.

Although care and protection petitions are often filed on behalf of children living in single-parent households, it is suggested that both parents (including non-adjudicated "biological" fathers, persons legally presumed, by marriage or otherwise, to be the child's father, and parents without custody), if known, be summonsed.

The importance of scheduling an early preliminary hearing is emphasized. It is in the interests of all parties that the initial hearing take place as soon as possible. The parent or custodian is anxious to be informed of the nature of the allegations; the welfare of the child, if a problem exists, would warrant a change in circumstances as soon as possible; and the petitioner who was aware of a problem initially is concerned with a speedy resolution. In the ordinary course, the hearing should take place no more than 14 calendar days after the date of filing of the petition, and much less if emergency conditions obtain (see Standards 2:07, 2:09).

Care and Protection Standards
Standard 3:01

3:01 Preliminary Hearing: Nature. THE PRELIMINARY HEARING USUALLY SERVES AS AN INITIAL OPPORTUNITY FOR THE COURT TO APPOINT COUNSEL, APPOINT AN INVESTIGATOR, BECOME ACQUAINTED WITH THE FACTS, AND CONTINUE THE MATTER TO A SPECIFIED FUTURE DATE FOR A FULL HEARING ON THE MERITS. THE COURT MAY ALSO ISSUE TEMPORARY ORDERS AT THIS TIME.

COMMENTARY

The preliminary hearing is usually the time when the court becomes acquainted with the parties and issues in the proceedings. At the preliminary hearing the court appoints counsel, see Standard 2:08; appoints an investigator if one has not been appointed previously, see Standard 3:02; and continues the matter to "a time fixed for hearing," G.L. c. 119, s. 25. The date for the filing of the investigator's report, see Standard 4:00 et. seq., should also be set at the preliminary hearing.

While s. 24 speaks of the court issuing "summonses to both parents . . . to show cause why the child should not be committed to the custody of the department . . . ," this should not be taken to mean that the parents have the burden of going forward, or as a presumption that the child should be committed. Rather, the preliminary hearing may be used by the parents to demonstrate that the petition is so lacking in merit (perhaps due to a mistake of identity or of fact, such as the parents' lack of custody of the child) that it should be dismissed forthwith. This can also present an opportunity for informal adjustments to be made, such as a voluntary transfer of care or custody by the parents to the department, or an agreement by the family to accept necessary services.

The court may often enter temporary custody orders at the preliminary hearing pursuant to G.L. c. 119, s. 25. See Standard 3:05 as to these and other types of temporary orders.

Care and Protection Standards
Standard 3:02

3:02 Appointment of Investigator. UPON THE ISSUANCE OF A PRECEPT AND ORDER OF NOTICE, G.L. c. 119, s. 24 REQUIRES THAT "THE COURT SHALL APPOINT A PERSON QUALIFIED . . . TO MAKE A REPORT TO THE COURT UNDER OATH OF AN INVESTIGATION INTO CONDITIONS AFFECTING THE CHILD"

COMMENTARY

A person qualified to make a report to the court is defined in G.L. c. 119, s. 21 as one who "is qualified as an expert according to the rules of the common law or by statute or is an agent of the department or of an approved charitable corporation or agency substantially engaged in the foster care or protection of children." Pursuant to this broad definition, the investigator need not be limited to employees of public or private agencies. Independent social workers or others who are found to be "qualified as an expert according to the rules of the common law" may be appointed as investigators. Each court should maintain a list of qualified investigators who are selected for the list by a judge of that court. Courts are encouraged to explore the resources in their communities in this regard. Ideally, courts should appoint only those individuals who have proven themselves to be qualified through training or experience, and who possess the requisite insight, discretion, organizational skills, and writing ability to be able to conduct a thorough investigation and to produce a competent report. Probation may be instrumental in assisting the court by interviewing and screening candidates, maintaining a list of qualified investigators, and referring them to the judge from the list for appointment as needed.

Attorneys, as such, are not qualified under s. 21 to conduct the investigations; however, they should not automatically be excluded from consideration for appointment if they otherwise meet the necessary qualifications. Some examples of appropriate appointments might include social workers for licensed foster care placement or social service agencies other than the Department of Social Services, child psychiatrists or psychologists, attorneys or others with past social work or investigatory experience, psychiatric social workers, or pediatricians or guidance counselors with extensive child welfare experience. The credentials of the person so appointed must be sufficient to withstand objections by the parties, as well as appellate scrutiny.

Care and Protection Standards
Standard 3:02 (Cont'd)

Although agents of the Department of Social Services are qualified by statute to conduct the investigations, they should not be appointed in this capacity. Even in cases filed by other parties or agencies, conflicts of interest may easily arise if the Department later assumes custody of the child named in the petition, or if it is to provide services to the family. As the court-appointed investigator must be impartial, such conflicts may well create appellate issues which would not otherwise have arisen. It should also be noted that it may present a conflict of interest, or at least an appearance of such, for a court to appoint an investigator from a private agency if that agency is party to an existing contract with DSS to provide services, at least where DSS is a party in the particular case, or likely to become one as a result of a transfer of custody.

Neither should a probation officer be appointed as the statutory investigator. The report to the court is made under oath, is attached to the petition and made a part of the record, is admissible in evidence, and "[t]he person reporting may be called as a witness by any party for examination as to the statements made in the report. Such examination shall be conducted as if it were on cross-examination." G.L. c. 119, s. 21. Since a probation officer is a court employee and, as such, has a special type of relationship with the judge, who is the factfinder, it would seem improper for a probation officer to appear as a witness to prove the facts alleged in the petition. A probation officer may, however, be requested by the court to supply further independently-obtained information for the use of the court. See District Court Bulletin No. 6-77, Item 6, December 21, 1977.

The statute provides that an investigator be appointed as soon as the precept and order of notice have issued. Assuming that there is not an extended delay between the time of issuance of the precept and the preliminary hearing, it is believed that the statutory purpose may be beneficially served by waiting until the preliminary hearing for the appointment of the investigator. In this manner, the court can be made aware of the agencies which have had contact with the child, and will be in a better position to name an appropriate investigator. In any event, when the investigator is appointed, he or she should be given a copy of Standard 4:01, as well as written notice of any additional conditions, limitations, or statements of policy that the court wishes to impose. See Standards 4:01 and 4:02.

An investigator should never be required by the court to provide his or her home address. Such information may endanger the investigator and is not germane to the proceeding. It would not be improper to require the name and address of the agency represented by the investigator, or, if it is an independent investigator, the business address of the investigator.

Care and Protection Standards
Standard 3:03

3:03 Guardian ad litem. IN APPROPRIATE CASES, JUDGES SHOULD CONSIDER THE APPOINTMENT OF A GUARDIAN AD LITEM FOR A PARTY, OR AN ADDITIONAL EXPERT INVESTIGATOR TO ASSIST THE COURT.

COMMENTARY

Although it is usually assumed that, if a party is represented by counsel, counsel can make all necessary decisions for the party, there may be instances in which this is not so. The advocacy role may conflict with the counseling role. In such circumstances, counsel, trained as an advocate rather than a counsellor, may find it difficult to make decisions on behalf of the party. There may also be situations in which counsel is unable to ascertain the client's true wishes and interests if the client is physically or mentally impaired.

In these or other similar situations, on motion of any party or attorney, or acting sua sponte, the court should consider the appointment of a guardian ad litem to represent a particular party's interests.

Likewise, the court may wish to seek additional expert information and advice, such as an assessment of, or recommendation for, a proposed treatment plan for a child by a medical or psychiatric specialist, which goes beyond the bounds of a s. 24 investigator's appointment and report, and which will assist the court in reaching its decision. If a written report is produced as a result of such an appointment, the parties must be permitted to cross-examine the author of the report before the court may rely on its contents. See Standard 4:00. This type of investigator/expert witness is not to be confused with a guardian ad litem, who is appointed to assist a specified party, rather than the court itself.

When making either type of appointment, the court should make clear to all parties the nature and purpose of the appointment, the duties of the appointee, and whose interests, if any, the appointee will be representing or guarding. See, e.g., Petition of Department of Social Services to Dispense with Consent to Adoption, 396 Mass. 485, 486 n.2, 487 N.E.2d 184, 185 n.2 (1986).

The court's authority to appoint either its own (non-s. 24) investigator or a guardian ad litem to facilitate the proceedings in a care and protection case stems from its equity powers under G.L. c. 218, s. 59. When considering the appointment of a

Care and Protection Standards
Standard 3:03 (Cont'd)

guardian ad litem, the court should keep in mind that ". . . a court of equity has both the power and the responsibility to care for and protect all those persons who, by virtue of some legal disability, are unable to protect themselves." Custody of a Minor, 375 Mass. 733, 744, 379 N.E.2d 1053, 1060 (1978). "In essence the powers of the court to act in the best interests of a person under its jurisdiction [citation omitted] must be broad and flexible enough 'to afford whatever relief may be necessary to protect his interests.' [Citations omitted.]" Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 756, 370 N.E.2d 417, 433 (1977). (See also, G.L. c. 210, s. 34 as to the Probate Court's authority to appoint guardians ad litem; and Police Commissioner of Boston v. Municipal Court of the Dorchester District, 374 Mass. 640, 665 n.18, 374 N.E.2d 272, 286 n.18 (1978), for a discussion of the District Court's powers of "ancillary jurisdiction" which are independent of a specific legislative grant of equity jurisdiction.)

Care and Protection Standards
Standard 3:04

3:04 Substitution of Parties. AT ANY POINT IN THE PROCEEDINGS, THE COURT MAY ENTERTAIN A REQUEST FROM THE PETITIONER TO BE SUBSTITUTED BY ANOTHER PARTY. AFTER ADVANCE NOTICE HAS BEEN GIVEN TO THE PROPOSED SUBSTITUTED PETITIONER AND OTHER PARTIES, THE COURT SHOULD HOLD A HEARING ON THE REQUEST.

COMMENTARY

The original petitioner may, at any point in the proceedings, move to be replaced by another person or agency involved in the matter, especially one having been granted custody of the child as a result of a previous hearing. Upon receiving such a request, and after notice to all parties, the court should hold a hearing to determine whether to allow the substitution, and if so, to establish any terms and conditions of such substitution, including whether the original petitioner should continue to receive notice of future proceedings or be entitled or required to participate in any such proceedings.

Care and Protection Standards
Standard 3:05

3:05 Temporary Orders. ORDERS AFFECTING PLACEMENT AND CUSTODY OF CHILDREN PRIOR TO ADJUDICATION SHOULD SET FORTH CLEARLY THE INTENTION OF THE JUDGE, AND SHOULD ADDRESS ALL RELEVANT ISSUES.

COMMENTARY

Temporary custody orders are often entered at the preliminary hearing pursuant to s. 25. Section 25 provides that at the preliminary hearing "the court may allow the child to be placed in the care of some suitable person or licensed agency providing foster care for children or the child may be committed to the custody of the department, pending a hearing on [the] . . . petition." Before any temporary custody order is entered, the judge should require more than the mere conclusory allegations contained in the petition, possibly the same recitation under oath by the petitioner of the "facts of the condition of the child" as are required for an emergency 72-hour order. See Standard 2:07. It is noted that the court may make temporary orders "as may be necessary to protect the child and society" even in the absence of counsel. See G.L. c. 119, s. 29. However, Custody of a Minor (No. 2), 392 Mass. 719, 725, 467 N.E.2d 1286, 1290 (1984), requires that judges exercise "utmost care in custody proceedings."

"Custody" is defined in G.L. c. 21 as including power:

- (1) to determine the child's place of abode, medical care and education;
- (2) to control visits to the child;
- (3) to consent to enlistments, marriages and other contracts otherwise requiring parental consent.

It is important to note that the statutory provision authorizing temporary placement orders permits the court to place the child in the care of some suitable person or licensed agency but to grant custody only to the Department. This distinction apparently means that, pending the hearing on the merits, someone other than the parent may be responsible for the care of the child, but only the Department may be granted custody. The above statute defines custody very broadly. However, if custody is granted to the Department pending an adjudication on the merits,

Care and Protection Standards
Standard 3:05 (Cont'd)

the Department should be directed to exercise only the powers enumerated in subsection (1) and (2) of G.L. c. 119, s. 21. The Department should be directed not to exercise the powers in subparagraph (3), as the grant of custody at this time is more in the nature of a holding operation and the powers in subparagraph (3) are of a permanent nature. Departmental regulations also provide certain restrictions on the granting by the Department of consent for certain non-routine medical or psychiatric procedures to be performed upon children in its custody. (See 110 CMR 11.00 et. seq.)

Because of the broad statutory definition of custody, temporary orders should be drafted with particular precision, noting either that the child is placed in the care (as opposed to custody) of a suitable person or licensed agency or that the child is committed to the custody of the Department. If the child is committed to the Department's custody, the order should state which, if any, of the s. 21 "custody" powers are to be vested in the Department.

Although the term "split custody" is used to describe orders granting "legal" custody to one party with "physical custody" (i.e. placement or care) in another, the term is not mentioned in the statute, nor is there any definition of "physical custody." In most instances, the preferable procedure is to leave "custody" intact with one party, with an understanding that the child's placement will be with a particular party, if the court so wishes, barring any material change in circumstances or subsequent problems with the placement. In this way, the party entrusted with legal responsibility for the child's well-being may be free to take steps to protect the child in the event of unforeseen difficulties without having first to return to court, or, in the case of the Department, having to exercise its powers under G.L. c. 119, s. 51B(3). Unless a particular placement is specifically ordered by the court, it is understood that the Department may place the child wherever it deems appropriate. In any event, the court should tailor its order with sufficient specificity that the various parties' rights and responsibilities are clearly enumerated and will be understood by all.

When issuing custody orders, judges should remember that whenever a judge "commits (or) grants custody . . . of a child to the department or its agent," the court must certify whether reasonable efforts were made either to prevent the removal or to return a child already out of the home, as required by G.L. c. 119, s. 29C. This requirement would appear to apply both to pre- and post-adjudicatory custody orders. A standard, pre-printed form for this purpose is expected to be made available through the Central Forms Procurement System at some point subsequent to this publication. (See the Appendix to these standards for a sample of an earlier version of this form.)

Care and Protection Standards
Standard 3:05 (Cont'd)

While not necessarily required, it would be good practice for the court, time permitting, to issue written findings to support the issuance of even temporary custody orders, as these orders may have a significant bearing upon the future course of events in the case. See Custody of Minor (No. 1), 377 Mass. 876, 389 N.E.2d 68 (1979). There must be some written record of every order. At a minimum, the clerk must record the terms of the order on the docket, in as much detail as is practicable.

Because the preparation of the investigator's report generally takes four to eight weeks, which may be followed by a short period of preparation for trial (see Standard 4:02), and because the temporary placement often influences the outcome of the case, it is important that great care be taken in arriving at the temporary placement decision. For instance, when possible, every effort should be made to continue the child in the same school, and siblings should be kept together. The importance of preserving the integrity of the family should not be overlooked. See, e.g., Petition of the Department of Public Welfare to Dispense with Consent to Adoption, 376 Mass. 252, 381 N.E.2d 565 (1978). Relatives and extended family members should also be considered as primary placement resources, when available.

In addition to, or in lieu of, temporary care or custody orders, the court may wish to issue other types of temporary orders. These may relate to visitation, DSS monitoring, school attendance, authorization for medical treatment, counselling, or other areas of concern. Again, any such order should be clearly drafted so as to provide appropriate guidance for the Department, if involved, and for all other parties.

It should be noted that G.L. c. 119, s. 29 requires the Department or other foster care agency to provide copies of a case or service plan to all parties within 45 days after the filing of an appearance by the agency. Any party may introduce the original or changed plan as evidence, and the parties may agree to file the plan with the court. A plan should include a statement of goals and objectives for the family, the services which will be provided to meet such goals and objectives, and the time necessary for achieving them. A well-written plan sets forth clearly for all parties exactly what the goals are and what is expected. It also enhances assessment opportunities at later stages of the proceedings. When any type of custody is granted, the court should ensure that this written treatment plan has been or will shortly be developed, and that the family members understand the terms of the plan. The judge may wish to be informed as to the contents of the plan in order to determine whether the parties' mutual expectations and promises are

Care and Protection Standards
Standard 3:05 (Cont'd)

reasonable in light of the circumstances of the case. Such a plan may be incorporated into the order, and the court may require that progress reports be submitted periodically to the court.

In regard to orders after an adjudication, see Standard 5:06.

INVESTIGATOR'S REPORT

- 4:00 Investigator's Report: Purpose and Usage
of Report
- 4:01 Investigator's Report: Contents
- 4:02 Investigator's Report: Availability
- 4:03 Investigator's Report: Updates

Care and Protection Standards
Standard 4:00

4:00 Investigator's Report: Purpose and Usage of Report.

GENERAL LAWS c. 119, s. 24 DIRECTS THE COURT, IN EVERY CARE AND PROTECTION CASE, TO APPOINT A QUALIFIED PERSON TO CONDUCT AN INVESTIGATION AND TO PREPARE A REPORT FOR THE COURT CONCERNING CONDITIONS AFFECTING THE CHILD.

COMMENTARY

The trier of fact can be assisted in the difficult task of deciding the outcome of the petition in a fair and just manner by having as much relevant information at hand as possible. Section 24 fulfills this need by providing the court with an independently-conducted investigation and summary report in every care and protection case. Through this vehicle, the court can obtain useful and important information which might otherwise not be presented by any of the parties to the proceedings. Although such reports would normally be subject to objection as hearsay, s. 21 makes them admissible in evidence, and s. 24 dictates that the report "be attached to the petition and be on [sic] a part of the record." The investigator's report is thus a valuable tool for the court, and this further highlights the need for judges to ensure that investigators are well qualified prior to appointing them.

The report must be in writing and available for inspection by all counsel. (See Standard 4:02.) In addition, parties must have the opportunity to call the investigator as a witness and to conduct a cross-examination as to the statements made in the report, as provided by s. 21. See Duro v. Duro, 392 Mass. 574, 579-580, 467 N.E.2d 165, 169-170 (1984); Custody of Two Minors, 19 Mass. App. Ct. 552, 559, 476 N.E.2d 235, 239-240 (1985).

Once the report is before the court for its consideration, the court is free to give it such weight as it deems appropriate. However, when reviewing the contents of an investigator's report and any supporting testimony (or indeed that of any expert witness), the judge must guard against wholesale incorporation of the witness' testimony or conclusions. Even if the judge finds the witness credible and agrees with the contents of the report, the document must not simply be rubber-stamped; the judge must reach an independent conclusion based upon the facts presented, and must support this conclusion with specific findings if it is to be used as a basis for depriving parents of custody. See

Care and Protection Standards
Standard 4:00 (Cont'd)

Petition of the Department of Public Welfare to Dispense with Consent to Adoption, 383 Mass. 573, 593, 421 N.E.2d 28, 39 (1981). This would also hold true in those cases in which the parties stipulate to the admission of the investigator's report as the only evidence to be presented to the court; the court must still evaluate the facts and reach its own decision. Where other evidence has been presented, the court should avoid undue reliance upon that presented by the investigator or other expert, and should carefully assess the weight to be accorded each piece of evidence which is before it.

It is fairly common for parties in care and protection cases to agree not only to the admission in evidence of the investigator's report after it has been filed, but also to an adjudication or dismissal based solely on the contents of the report. In such instances, the judge should carefully review the available evidence and the proposed terms of the stipulation to ensure that any action being requested is consistent with the facts, the law, and the child's best interests. If there is an insufficient basis on which to render a decision, or if the proposed stipulation is not supported by the record, the judge may wish to reject the stipulation or call for further hearing on the matter. (See also Standard 5:01 regarding the acceptance of stipulations.)

If the investigator's report is not offered into evidence by any of the parties, the court may nevertheless consider it as evidence and rely upon it in reaching a decision; however, the judge should inform the parties of his or her intention to do so before rendering the decision. In this way, counsel may make an informed decision as to whether to call the investigator to the stand. See Custody of Two Minors, 19 Mass. App. Ct. 552, 559, 476 N.E.2d 235, 240 (1985).

Care and Protection Standards
Standard 4:01

4:01 Investigator's Report: Contents. THE INFORMATION IN THE INVESTIGATOR'S REPORT SHOULD BE LIMITED TO FACTUAL MATERIAL, PERSONAL OBSERVATIONS, AND INFORMATION OBTAINED FROM PERSONS NAMED IN THE REPORT.

COMMENTARY

General Laws c. 119, s. 24 provides that the investigator "make a report to the court under oath of an investigation into conditions affecting the child." Section 21 further clarifies the intended content of the report by providing that the investigator, who must be qualified as an expert, file "a report in full of all the facts obtained as a result of such investigation." Investigators should refrain from including irrelevant information, totem-pole hearsay, opinions of non-experts, and other immaterial or inadmissible information in their reports. However, s. 21 does provide an exception to the hearsay rule in allowing the use of such reports (at least as to first-level hearsay) as evidence. Hearsay from sources who are unnamed or unknown to the investigator should not be included in the report, as its validity cannot be verified, nor can the credibility of the source be evaluated in a meaningful way, either by the investigator or by counsel upon cross-examination. (This is to be distinguished from situations in which a person interviewed by the investigator requests to remain anonymous. Under appropriate circumstances, the investigator may choose not to name a particular source when completing the report, but should inform the source that identification will be made if the investigator is so ordered at the trial or other hearing.)

Accordingly, the report should contain facts (information which can be documented), and personal observations; may contain opinions of the investigator as well as information from other persons who are named in the report; and should contain documentation when required. These limitations will permit all parties to fairly cross-examine the investigator as to all contributions to the report.

The prior developmental history of the parent is one of many factors to be considered and may be relevant to the parent's ability to care for the child. Care should be taken, however, to disregard irrelevant history, bearing in mind that the primary focus should remain on the child and the conditions under which the child is living.

Care and Protection Standards
Standard 4:01 (Cont'd)

Although it is a fairly common practice for investigators to include their personal conclusions and recommendations as to the outcome of the case at the end of their reports, judges may instead wish to direct that these be omitted from the reports, or that they be kept separate from the body of the report for possible future use in a separate dispositional hearing, if one is anticipated.

The judge ordering the investigation should make every effort to assure that the investigator is aware of these limitations upon the contents of the report, and a copy of this standard and a list of any other conditions which the court wishes to impose should be given to the investigator upon his or her appointment. Where necessary, the limitation may be enforced by orders to strike non-factual material from the report, or by rulings to similar effect upon objection during trial. If there is some question regarding particular portions of the report, a preliminary conference may be held, on the record and with all counsel present, prior to the hearing on the merits in order to consider these matters.

Lastly, the investigator may be unable to obtain access to certain necessary records, such as those related to psychiatric care, drug-related treatment, or criminal history, and may wish to seek a court order so that the records may be released. The court may wish to hold a hearing on the issue, especially if the records are privileged or confidential by regulation or by statute.

Care and Protection Standards
Standard 4:02

4:02 Investigator's Report: Availability. THE REPORT SHOULD BE AVAILABLE TO ALL PARTIES UPON BEING FILED AND IN SUFFICIENT TIME TO PERMIT ADEQUATE PREPARATION FOR TRIAL OR, IN ANY EVENT, AT LEAST 14 CALENDAR DAYS PRIOR TO TRIAL.

COMMENTARY

Since the investigator's report is considered evidence, and the person reporting may be called as a witness for cross-examination, see G.L. c. 119, s. 21, the report should be available to the attorneys for all parties at least 14 calendar days prior to the hearing. At the time of appointment (usually the preliminary hearing), the court should set a date for the report to be filed with the court and made available to all attorneys, and to any other parties entitled to access by court order or custom (see below). This date should be far enough from the preliminary hearing so as to permit a complete investigation to be conducted and reduced to writing, but without extended delay. Generally, four to six weeks will be an appropriate target date. The court should also specify whether the report is to be filed with the clerk's office or with probation, and this information should be transmitted to the investigator. As stated above, the date for filing the report should be at least 14 days prior to the date set for hearing, unless the circumstances require that this time be lengthened. This procedure will provide counsel an opportunity to rebut the facts stated in the report, and to procure additional witnesses or other evidence as might be indicated upon reading the report. Delay in the availability of the report should be grounds for a continuance or other appropriate action by the court.

If the judge intends to require the investigator's presence at either the pre-trial conference (if any), the trial, or at all hearings, regardless of whether any of the attorneys will be asking for the investigator's participation, this should be clearly communicated to the investigator (as well as the attorneys) with as much advance notice as possible.

Each court should consider establishing a general policy as to access to the reports by principal parties such as parents, children and petitioners. While it is not recommended that parents (unless pro se) or children be provided copies of the reports, courts may wish to allow them to read the reports,

Care and Protection Standards
Standard 4:02 (Cont'd)

either in the company of their attorneys, or with other safeguards against possible misuse. The court may also wish to include in this policy a rule concerning access to and use of the reports by social workers assigned to the particular cases. If the court's policy generally permits expanded access to the principals, investigators should be apprised of this at the outset, as the status of potential readers may have a bearing upon the ultimate content of a given report. Instead of setting a general policy, the court may wish to deal with the question of access on a case-by-case basis. One way in which to approach this would be for the judge or the attorneys to read each report as it is submitted in order to determine whether there will be a problem if expanded access is authorized. In appropriate cases, either sua sponte or upon motion of the investigator or an attorney who has read the report, the court may issue orders limiting access to the report, either in whole or in part, to anyone other than the attorneys in the case.

Although it is recommended that attorneys be permitted to obtain copies of the report, the sensitivity of the matters with which the report is concerned necessitates added precautions for the protection of the parties. Accordingly, upon filing their appearance or thereafter, attorneys in care and protection proceedings who wish to obtain a copy of the investigator's report should file an affidavit stating that they will not reproduce for or show anyone other than the authorized parties the complete report. The affidavit should also state that the attorney will return the copy to the court when his or her participation in the process is completed.

The copy that is provided for the attorneys may be on blank, rather than letterhead, stationery, and may be unsigned. This precaution, too, is for the protection of the parties. A report on plain stationery does not lend an official imprimatur to the contents of the report, as does a summary typed on stationery bearing the name of the investigator or agency. It may also be a helpful precaution to label the report "Confidential; do not reproduce."

To summarize, the investigator should be informed as soon as possible as to the deadline for the submission of the report, the office with which the report is to be filed, any scheduled or anticipated hearings or conferences which the investigator will be required to attend, and the degree to which parties will likely be permitted access to the report.

Care and Protection Standards
Standard 4:03

4:03 Investigator's Report: Updates. WHEN THERE HAS BEEN A MATERIAL CHANGE IN CIRCUMSTANCES OR A LENGTHY PASSAGE OF TIME AFTER THE INVESTIGATOR'S REPORT HAS BEEN SUBMITTED, THE COURT SHOULD CONSIDER ORDERING THE REAPPOINTMENT OF THE INVESTIGATOR TO UPDATE THE REPORT.

COMMENTARY

The Supreme Judicial Court has emphasized the urgent need for expediting these proceedings lest they fail to accomplish their purpose; circumstances may change rapidly, and with the passage of time, the harm sought to be avoided may worsen. Custody of a Minor, 389 Mass. 755, 764, 452 N.E.2d 483, 488-489 (1983). In addition, decisions on care and protection petitions must be based upon current factual information which indicates the existence of ongoing parental unfitness. As the investigator's report tends to be a crucial factor in the court's decision-making, it is vital that the report be utilized soon after its preparation.

If, for any reason, there is a protracted delay between the submission of the report and the hearing on the merits, or after the hearing but before the decision is rendered, the court should strongly consider ordering an update to the report. Similarly, if the court becomes aware that there has been a material change in circumstances in the case which has occurred after the filing of the report, an update or supplemental report may be indicated, provided that this will not itself cause a lengthy delay.

HEARING

5:00	Hearing
5:01	Stipulations
5:02	Rules of Evidence
5:03	Standard of Proof
5:04	Issue to be Proved
5:05	Findings
5:06	Adjudication
5:07	Orders
5:08	Orders for Support

Care and Protection Standards
Standard 5:00

5:00 Hearing. THE HEARING SHOULD BE CONDUCTED IN A RELATIVELY FORMAL SETTING, AND MAY BE BIFURCATED INTO SEPARATE ADJUDICATORY AND DISPOSITIONAL STAGES.

COMMENTARY

Because of the nature of the subject matter in care and protection proceedings, it is important to try to make the hearing process less intimidating for the family, as well as to protect the rights of all parties while so doing. Therefore, some of the procedural formalities normally attendant to trials of other types of cases may be relaxed. For example, a small courtroom should be chosen, if possible; the court may allow non-traditional seating arrangements; and all witnesses may be sworn simultaneously. Additionally, there may be some flexibility to the order of presentation of the child's and the parents' respective cases, and the court may permit some witnesses who are professionals to testify out of turn, if necessary. However, the proceedings should not be allowed to lapse into informality. The petitioner's case should be presented first. All testimony must be sworn and on the record, and there must be an opportunity for the cross-examination of all witnesses. All evidence must be presented in accordance with applicable rules of evidence.

General Laws c. 119, s. 26, as appearing in the 1986 Official Edition, provides in part:

If the child is identified by the court and it appears that the precept and summonses have been duly and legally served, that said notice has been issued to the department and said report is received, the court may excuse the child from the hearing and shall proceed to hear the evidence.

As soon as the above statutory requirements have been met, it is recommended that the child be excused from the hearing, whenever possible. The court may, however, upon its own motion or upon request of counsel, permit the presence of the child during the proceedings in appropriate cases. Depending upon the child's age and the circumstances of the case, the child may also appear as a witness in the proceedings; however, this is not a common occurrence, and is not to be encouraged. Note, however, that in certain cases, especially those involving children who appear to be of sufficient maturity and understanding, it may be

Care and Protection Standards
Standard 5:00 (Cont'd)

appropriate for the child's attorney to have the child testify, as the preferences of such children are relevant factors for the judge's consideration. Custody of a Minor, 383 Mass. 595, 602, 421 N.E.2d 63, 67 (1981). Also, "[w]here a child has been placed in someone's care by agreement of the parents, the wishes of the child to remain in that person's care have been given weight." Id. [citations omitted].

In many cases, it may be necessary or otherwise appropriate to divide the hearing into separate adjudicatory and dispositional phases, although this is not required by statute. Under this approach, the court would only hear evidence regarding dispositional alternatives if, at the conclusion of the adjudicatory stage, it had determined that the child was in need of care and protection. Whether or not a particular case is actually bifurcated in this manner, the judge's decision should most often follow this two-part reasoning process, in the interests of fairness. Consideration of desirable dispositional alternatives should not influence the decision on the merits. If a parent is not unfit and a child is therefore not in need of care and protection, the dispositional options become irrelevant. (See e.g. Custody of a Minor, 389 Mass. 755, 452 N.E.2d 483 (1983).) Bifurcating a case may also save time by obviating the need for the production of evidence relating to disposition, since the question of dispositional alternatives may never be reached.

Regardless of the manner in which the trial is conducted, the case should be heard in its entirety with as few interruptions as possible, preferably with day-to-day hearings. The Supreme Judicial Court has recognized the importance of this type of continuity. "Once a trial begins it should proceed expeditiously to completion. All parties involved then benefit from increased continuity. Efficiency is increased when delays between hearings are kept to a minimum." Care and Protection of Three Minors, 392 Mass. 704, 705 n.3, 467 N.E.2d 851, 854 n.3 (1984).

Care and Protection Standards
Standard 5:01

5:01 Stipulations. STIPULATIONS WHICH MAY SERVE TO
ELIMINATE THE NEED FOR A TRIAL ON THE MERITS SHOULD BE ACCEPTED
WITH CAUTION.

COMMENTARY

It will sometimes be unnecessary to proceed with a trial on the merits. General laws c. 119, s. 24 provides that "Any child may be committed to the department under this section without a hearing or notice with the consent of the parent or parents or guardian." The purpose of this provision is to allow parents who do not oppose an order of custody to the department to avoid the necessity of a full trial. (This should not be confused with s. 23(A), by which a parent may temporarily delegate certain rights and responsibilities to the Department for purposes of providing foster care, nor with s. 23(B) or G.L. c. 210, s. 2, both of which involve a voluntary surrender of custody for purposes of consent to adoption.) In some cases, the exercise of this provision may be reflected in a stipulation of counsel, although the court is free to reject any such stipulation which it deems unwise or unfair. It is unclear whether the court, after accepting such a stipulation and committing the child to the Department, would still have to issue written findings of fact.

Before or at the time of the hearing, the parties may agree to a particular service plan, continuance, adjudication, dismissal, or other course of action. In deciding whether to accept such an agreement, the court should be mindful of several important considerations.

First, the stipulation should be made on the record, preferably in writing and signed by all parties, with terms that are clear and unequivocal.

Next, the court should not accept any stipulation which would result in a prolonged continuation of a case without an adjudication.

Further, any stipulation which is accepted by the court should be reduced to an order, and the order should be carefully worded so as to accurately reflect the stated intent of the parties.

Care and Protection Standards
Standard 5:01 (Cont'd)

Finally, as stated in Standard 4:00, there must be an adequate legal and factual basis for taking the requested action, and there must be sufficient evidence before the court to permit the judge (when required) to frame findings of fact in support of the continuance, adjudication or custody order. It is the court's responsibility to reject any stipulation which it deems to be unwise, unfair, or unsupported by the facts in a given case.

5:02 Rules of Evidence. GENERAL LAWS c. 119, s. 21
PROVIDES THAT EVIDENCE "SHALL BE ADMISSIBLE ACCORDING TO THE
RULES OF THE COMMON LAW AND THE GENERAL LAWS."

COMMENTARY

It is most important to the integrity of the process and for the protection of the rights of the parties that the rules of evidence be followed in all adjudicatory stages of care and protection proceedings, and in any other stages in which parental unfitness is at issue or in which evidence relating to parental unfitness is sought to be introduced. This observance will also further the goals of providing all parties with knowledge of what to expect and of achieving uniformity of procedure.

The Supreme Judicial Court cautioned, in the case of Custody of Two Minors, 19 Mass. App. Ct. 552, 557, 476 N.E.2d 235, 239 (1985), that where even "dispositional" hearings potentially involve the separation of parents from their children, traditional evidentiary safeguards must be applied. The court held, based on the facts in the case, that medical reports bearing on the fitness of the parent should not have been admitted during the dispositional stage of the hearing, where the reports would have been inadmissible during the adjudicatory stage. Id. at 553, 476 N.E.2d at 236. The court further held, more generally, that ". . . the evidentiary safeguards applicable to the adjudicatory aspect of care and protection proceedings apply with equal force to evidence relating to parental fitness received at the dispositional phase." Id. at 558, 476 N.E.2d at 239. The emphasis of the court's rulings seems to be upon the nature of the proffered evidence and the interests at stake, rather than the type of hearing involved. Although it may therefore be permissible, under limited circumstances, to accept hearsay evidence which relates solely to the child's circumstances (such as, e.g., a report as to the merits of a foster home versus a group care facility, or a progress report from a school), judges should be extremely cautious in this regard. It is often difficult, if not impossible, to draw the line between the "best interests of the child" and "parental unfitness." Indeed, the Supreme Judicial Court has stated that these factors are "cognate and connected" and, in most situations, intrinsically linked. (See e.g. Petition of N.E. Home for Little Wanderers to Dispense with Consent to Adoption, 367 Mass. 631, 328 N.E.2d 854 (1975).) It is therefore advisable for judges to take the broadest possible view when determining whether the evidence in question may tend

Care and Protection Standards
Standard 5:02 (Cont'd)

to "relate to parental fitness," as well as to consider the potential interests at stake (such as the removal of the child or a termination of visitation as a result of the hearing) when considering whether to admit hearsay evidence over objection.

Although s. 21 permits the use of first-level hearsay in the report of the investigator or agent of the Department, this exception to the rules of evidence does not extend to other types of documents, nor to hearsay evidence from a testifying witness.

Another exception to the hearsay rule is contained in s. 29, which provides for the development and distribution to all parties of a service or case plan within 45 days of the filing of an appearance by the Department (or other agency) in a care and protection case. Section 29 directs that ". . . any party may have the original or changed plan introduced as evidence, and with the consent of all parties such plan shall be filed with the court."

It is worthy of note that several evidentiary privileges, which in other types of cases might bar a good deal of relevant testimony, contain specific statutory exceptions which relate to care and protection and other types of child custody cases. These include privileges set forth in G.L. c. 112, s. 135 (social workers), G.L. c. 233, s. 20 (husbands and wives), and G.L. c. 233, s. 20B (psychotherapists).

As to the social worker privilege, it should be noted that there are two exceptions which may come into play. The first, under G.L. c. 112, s. 135(d), is an absolute exception which renders the privilege inapplicable to care and protection and termination proceedings. (Also, see Petition of Department of Social Services to Dispense with Consent to Adoption, 397 Mass. 659, 493 N.E. 2d 197 (1986), and Adoption of Diane, 400 Mass. 196, 508 N.E.2d 837 (1987), which construe this exception as being applicable to the testimony of any social worker, whether or not he or she filed the petition in question.)

The other exception, under G.L. c. 112, s. 135(e), applies to "child custody," adoption and termination cases. However, this exception is qualified, and requires a judge to balance certain interests before deciding whether to permit the introduction of testimony which would otherwise be privileged. It would therefore seem the better course to proceed under paragraph (d) when admitting a social worker's testimony in these matters.

The psychotherapist privilege found in G.L. c. 233, s. 20B also contains a qualified exception, in paragraph (e), requiring a balancing test before the privilege may be overcome. Statute 1987, c. 398 amended the exception, rendering it equally applicable to care and protection, adoption and termination proceedings.

5:03 Standard of Proof. IN CARE AND PROTECTION PROCEEDINGS, THE JUDGE MUST DETERMINE WHETHER THE EXISTENCE OF PARENTAL UNFITNESS OR THE NEED FOR REMOVING CUSTODY HAS BEEN PROVEN BY CLEAR AND CONVINCING EVIDENCE.

COMMENTARY

The U.S. Supreme Court, in Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388 (1982), ruled that the Due Process Clause of the Fourteenth Amendment requires at least clear and convincing evidence in cases wherein the state is seeking the irrevocable termination of parental rights. The court recognized that parents have a fundamental liberty interest in the care, custody, and management of their child, and noted that this interest ". . . does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." (Id. at 753, 102 S. Ct. at 1394-1395.)

In analyzing the interests at stake in order to determine the minimally constitutionally acceptable standard of proof, the court rejected a balancing of the child's and the parent's rights, and instead chose to focus the test on a comparison of the parent's interests with those of the State. Because of the "near-equal allocation of the risk" engendered by the preponderance of the evidence standard, the court found that standard to be constitutionally intolerable and violative of the parent's rights of due process. The elevated clear and convincing standard of proof more properly allocates the risk of error in the proceedings.

Although this decision spoke only of the standard of proof to be applied in termination cases, the appellate courts in Massachusetts have since applied the clear and convincing standard not only to all termination of parental rights cases (G.L. c. 210, s. 3), but also to all care and protections, at least those involving state intervention, and to other types of proceedings involving child custody and state intervention. (See e.g. Custody of a Minor (No. 3), 14 Mass. App. Ct. 1013, 441 N.E. 2d 768 (1982), in which the standard was applied to a case involving a complaint seeking modification of a divorce judgment and custody of a minor child.)

The clear and convincing standard should be applied both to the adjudicatory and dispositional phases of the care and protection case, as it relates to findings of parental unfitness

Care and Protection Standards
Standard 5:03 (Cont'd)

as well as to the issuance of orders depriving parents of custody. The same standard must also be applied in later stages of the case, such as a review and redetermination under G.L. c. 119, s. 26, if similar findings or orders are to be entered. Finally, the standard applies to orders terminating a parent's visitation rights. (See e.g. Custody of a Minor (No. 2), 22 Mass. App. Ct. 91, 491 N.E.2d 283 (1986), involving the application of the standard in a s. 26 review in which visitation rights were terminated.)

5:04 Issue to be Proved. THE PETITIONER MUST PROVE CURRENT PARENTAL UNFITNESS IN ORDER TO OBTAIN AN ADJUDICATION OR AN ORDER REMOVING CUSTODY OF A CHILD FROM A PARENT. WHERE VISITS ARE TO BE TERMINATED, THERE MUST BE A CLEAR AND CONVINCING DEMONSTRATION THAT PARENTAL VISITS WILL HARM THE CHILD.

COMMENTARY

In order to find a child to be in need of care and protection and to remove custody from a parent, a court must be persuaded by clear and convincing evidence that the parent is currently unfit to further the welfare and best interests of the child. This substantive standard must also be observed in other stages of the case, such as a review and redetermination, and before any other type of equally significant ruling (such as a termination of visitation rights) may be ordered.

The term "parental unfitness" has been characterized or discussed in a number of ways: as a parent's possession of "grievous shortcomings or handicaps that would put the child's welfare in the family milieu much at hazard" and as a test which is not separate and distinct, but cognate and connected to the "best interests of the child" test (Petition of New England Home for Little Wanderers to Dispense with Consent to Adoption, 367 Mass. 631, 646, 328 N.E.2d 854, 863 (1975)); "unsuitable, incompetent, or not adapted for a particular use or service" (Richards v. Forrest, 278 Mass. 547, 552, 180 N.E. 508, 510 (1932)); "The unfitness of parents . . . must be determined with respect both to their own character, temperament, capacity, and conduct, and to the welfare of the child in connection with its age, environment, and affections" (id. at 554, 180 N.E. at 511); "Neither the 'parental fitness' test nor the 'best interests of the child' test is properly applied to the exclusion of the other" (Bezio v. Patenaude, 381 Mass. 563, 576-577, 410 N.E.2d 1207, 1214-1215 (1980)); "The controlling question is whether the welfare of (the) child would be seriously endangered if custody is not transferred from the mother" (Custody of a Minor, 389 Mass. 755, 769, 452 N.E.2d 483, 491 (1983)).

In the context of the termination of visitation, parental unfitness must be presented in such a way as to permit the judge to issue specific findings demonstrating that parental visits will harm the child. Custody of a Minor (No. 2), 22 Mass. App.

Care and Protection Standards
Standard 5:04 (Cont'd)

Ct. 91, 491 N.E.2d 283 (1986); Custody of a Minor (No. 2), 392 Mass. 719, 726, 467 N.E.2d 1286, 1291 (1984).

Current parental unfitness may be established by looking at past events or a parent's treatment of other children. In Custody of a Minor (No. 1), 377 Mass. 876, 883, 389 N.E.2d 68, 73 (1979), the Supreme Judicial Court stated that ". . . [A]n assessment of prognostic evidence derived from an ongoing pattern of parental neglect or misconduct is appropriate in the determination of future fitness and the likelihood of harm to the child. [Citations omitted.] Such evidence, particularly where unrebutted by more recent proof of parental capacity, provides a satisfactory basis for a finding of current parental unfitness." The court used this reasoning to uphold a finding that one child was in need of care and protection based upon evidence demonstrating an ongoing pattern of neglect of the child's older siblings by the parents. In a more recent case, Custody of a Minor (No. 2), 22 Mass. App. Ct. 91, 491 N.E.2d 283 (1986), the Appeals Court held that the same standard of proof which is applied to permanent custody decisions must also be observed in terminating visitation rights in the context of a s. 26 review. However, although there must therefore be clear and convincing proof of current parental unfitness as of the time of the review and redetermination, the review does not begin with a "blank slate." Rather, each successive review builds upon preceding stages of the case, and facts do not have to be relitigated. "In undertaking a s. 26 review it is appropriate for the judge to apply all that has been learned since the previous hearing to the central questions: the fitness of the parent or parents and the welfare of the child." [Citations omitted.] Id. at 94, 491 N.E.2d at 285-286.

In most cases, bonding alone will be insufficient to establish parental unfitness, and other supporting facts will most likely be required to demonstrate the harm that would be suffered by the child if the parent were to regain (or retain) custody. However, it may be possible to find a parent unfit based upon a lengthy separation of the child from the parent and a corresponding growth in ties (or psychological "bonding") between the child and a substitute custodian. See Custody of a Minor, 389 Mass. 755, 768, 452 N.E.2d 483, 491 (1983).

The fitness of both parents must be examined, since the unfitness of one, coupled with the failure of the other to take appropriate protective actions, may render the couple unfit. In Wilkins v. Wilkins, 324 Mass. 261, 85 N.E.2d 768 (1949), involving guardianship proceedings, the trial judge had found the mother, but not the father when considered separately, to be unfit to have custody of the minor child. However, the Supreme Judicial Court concluded on review that the parents, jointly, taken as a couple, were unfit within the meaning of the applicable statute (G.L. c. 201, s. 5) to have custody.

Care and Protection Standards
Standard 5:04 (Cont'd)

Much has been said by the Supreme Judicial Court about factors which may not properly be considered to constitute unfitness. "Mere failure to exercise custodial rights in the past, particularly where a parent has voluntarily relinquished custody 'for appropriate reasons' [citation omitted], does not support a conclusion that such parent is unfit to further the welfare of the child." Bezio v. Patenaude, 381 Mass. 563, 577, 410 N.E.2d 1207, 1215 (1980). "Custody is not to be transferred from the natural parent simply because another prospective custodian is thought to be better qualified. A comparison of the advantage the prospective custodian may offer to the child with those that may be offered by the natural parents is inappropriate." Custody of a Minor, 389 Mass. 755, 765, 452 N.E.2d 483, 489 (1983). "The State may not deprive parents of custody . . . 'simply because their households fail to meet the ideals approved by the community . . . [or] simply because the parents embrace ideologies or pursue life-styles at odds with the average.'" Bezio, id. at 579, 1216, quoting from Custody of a Minor (No. 2), 378 Mass. 712, 719, 393 N.E.2d 379, 383 (1979). "Clearly, under the test our cases articulate, the State may not deprive parents of the custody of their children merely because they are poor and cannot offer the child certain material advantages, or because they choose or suffer an unusual life style. It is not the quality or character of parental conduct per se that justifies State intervention on behalf of an abused, neglected, or otherwise endangered child. Rather, it is the fact of the endangerment itself." Petition of the Department of Public Welfare to Dispense with Consent to Adoption, 383 Mass. 573, 591-592, 421 N.E.2d 28, 38 (1981).

It is virtually an identical standard of unfitness that is now applied in all proceedings involving the custody of minor children, especially those in which there has been state intervention, including care and protections (in both the District and Probate Court), guardianships (of minors), and petitions to dispense with parental consent to adoption. See Custody of a Minor, 389 Mass. 755, 765, 452 N.E.2d 483, 489 (1983). This commonality of definition and focus will assist judges who may be hearing consolidated cases which have been interdepartmentally assigned.

Care and Protection Standards
Standard 5:05

5:05 Findings. AFTER HEARING THE EVIDENCE, THE COURT MUST PROMPTLY ENTER SPECIFIC AND DETAILED WRITTEN FINDINGS OF FACT DEMONSTRATING THAT CLOSE ATTENTION HAS BEEN GIVEN THE EVIDENCE AND, IF THERE IS TO BE A CUSTODY ORDER, THAT THE NECESSITY OF REMOVING THE CHILD HAS BEEN PERSUASIVELY SHOWN.

COMMENTARY

Even prior to the ultimate adoption of the "clear and convincing" standard of proof, the Supreme Judicial Court set forth stringent requirements for judges to follow when deciding care and protection cases. Thus, in Custody of a Minor (No. 1), 377 Mass. 876, 885-886, 389 N.E.2d 68, 75 (1979), the court held that in custody controversies between the parent and the state,

the personal rights implicated in proceedings of this character require the judge to exercise the utmost care in promulgating custody awards. Such care . . . demands that the judge enter specific and detailed findings demonstrating that close attention has been given the evidence and that the necessity of removing the child from his or her parents has been persuasively shown.

This requirement is not limited to cases where the ultimate outcome is the loss of custody by a parent. "In all cases of child neglect, including those where a disposition depriving a parent of custody is adjudged unnecessary, see Custody of a Minor, 375 Mass. 733, 379 N.E.2d 1053 (1978), we think it well advised that a judge make specific findings of fact." Id. The reason for this requirement is that

'[A]s every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of (one's) duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression paper.' United States v. Forness, 125 F.2d 928, 942 (2d Cir.), cert. denied sub nom. Salamanca v. United States, 316 U.S. 694 (1942) (Frank, J.).

Care and Protection Standards
Standard 5:05 (Cont'd)

Even in cases where, after trial, the judge finds that a child is not in need of care and protection and dismisses the case on the merits, written reasons for the finding and dismissal should be entered. This will permit the Department or child to exercise their rights of appeal, as written findings must be made before an appeal can proceed. (See Custody of a Minor (No. 2), 386 Mass. 460 at 463, 436 N.E.2d 392 at 394-395 (1982), as to the Department's right to appeal.)

In sum, written findings should be issued to support any significant ruling or action in a care and protection case.

The findings of fact and conclusions of law should be promptly entered upon completion of the hearing, while the evidence is still fresh in the judge's mind. "[T]he longer a judge takes to make his findings of fact, the dimmer will be his memory of the testimony." Care and Protection of Three Minors, 392 Mass. 704, 705 n.3, 467 N.E.2d 851, 854 n.3 (1984). More specifically, G.L. c. 119, s. 27 directs that a trial justice must file "detailed findings of fact and conclusions of law" before or within ten days after the entry of an adjudication under s. 26.

It is important that the findings of fact be carefully drafted in order to withstand appellate scrutiny and avoid a subsequent remand of the case. Although a court's decision may in fact be supported by the evidence, the findings must also be sufficient, as they are a reflection of the judge's reasoning process.

Findings in support of an adjudication or custody order must demonstrate that the parent has been proven by clear and convincing evidence to be currently unfit, and that the determination of unfitness was based upon appropriate factors. For example, a finding that a parent is poor would not be a sufficient basis for concluding that the parent is unfit. However, a finding that the parent is unable to keep a steady job or to manage his or her financial affairs in a responsible manner would be an appropriate consideration. See Care and Protection of Three Minors, 392 Mass. 704, 713 n.12, 467 N.E.2d 851, 858 n.12 (1984). Similarly, while a judge may not base a finding of unfitness upon subjective disapproval of a parent's life-style, this is not to say that a judge may never consider the instability and unsuitability of a parent's living situation as bearing on his or her fitness to raise children. For example, a judge may properly focus on a mother's frequent change of living arrangements ". . . as an illustration of her inability to

Care and Protection Standards
Standard 5:05 (Cont'd)

provide a stable, healthful home environment for her children. A judge is permitted to consider the fact that a mother's home lacks heat during the winter time or, if within her control, it is greatly overcrowded, or is dirty and insect-infested." Id. at 713 n.11, 467 N.E.2d at 858 n.11. "A finding that a parent is unfit to further the welfare of the child must be predicated upon parental behavior which adversely affects the child." Bezio v. Patenaude, 381 Mass. 563, 579, 410 N.E.2d 1207, 1216 (1980). In other words, the findings should not merely recite that the parent exhibits adverse behavior or suffers from a particular handicap or shortcoming, but rather should link the problem to the child's well-being, demonstrating that the child, if exposed to the problem, would be endangered, and showing the necessity of removing the child. See e.g. Custody of a Minor (No. 2), 378 Mass. 712, 722, 393 N.E.2d 379, 385 (1979), which further clarifies this subject by example: "It is not enough to state that [a parent] suffers from a mental disorder. Rather, it is necessary to detail the specific symptoms or delusions precipitated by this disorder that render the parent unfit." "For the mental disorder to be relevant, there must be a showing that it has a bearing on the parent's fitness or on the child's well-being." Petition of the Department of Social Services to Dispense with Consent to Adoption, 392 Mass. 696, 701, 467 N.E.2d 861, 865 (1984). Where a judge makes an explicit finding, for example, that a mother "' . . . can become psychotic under stress, unable to distinguish fantasy from reality,' [t]his finding adequately relate[s] the mother's mental condition to her fitness to care for the child." Id.

In certain cases, judges may be required to make additional findings of fact as to aspects of the case other than the adjudication or the need for the custody order. For example, in Care and Protection of Three Minors, 392 Mass. 704, 467 N.E.2d 851 (1984), the Supreme Judicial Court remanded the case because the findings failed to address the importance of the sibling relationship between the children and whether the placement of all three children with their grandparents would be in their best interests. Additionally, the court held that in such a case as this, where the siblings had had significant and valuable visitation with their mother, grandparents, and each other, it was incumbent upon the judge who committed the children to the Department to " . . . include in his order some direction to the department that visitation shall continue or make findings that support his conclusion if he believes it should not." Id. at 718, 467 N.E.2d at 861.

Care and Protection Standards
Standard 5:05 (Cont'd)

Similarly, the Supreme Judicial Court remanded the case of Custody of a Minor (No. 2), 392 Mass. 719, 467 N.E.2d 1286 (1984) due to findings that were deficient in several respects. First, the findings did not support the judge's conclusion and order. Next, the findings indicated that the judge relied only upon evidence relating to the child's best interests, without considering the parent's current fitness. Indeed, the judge found that at the time of trial, the mother was exhibiting "positive parenting skills." The permanent custody order was based entirely upon the child's psychological bonding to the foster parents, rather than upon the psychological effect of returning the child to the natural parents. In addition, there was a ". . . wholesale adoption of the psychologist's opinions and findings We have stated previously that '[w]holesale incorporation of (a) psychiatrist's testimony in the absence of specific and detailed findings by the judge makes it impossible for us to ascertain whether the judge has given close attention to the evidence and arrived at an independent judgment based upon that evidence, or whether the judge is simply rubberstamping the conclusion of the expert witness.' Petition of the Department of Public Welfare to Dispense with Consent to Adoption," 383 Mass. 573, 593, 421 N.E.2d 28, 39 (1981). Id. at 725, 467 N.E.2d at 1290. Finally, the court held that before terminating a parent's rights of visitation, a judge must make specific findings demonstrating that parental visits will harm the child or the public welfare. [Citations omitted.]

See Standard 6:02 as to the entry of findings of fact in reviews pursuant to G.L. c. 119, s. 26.

A judge may permit or require counsel to submit proposed findings of fact and conclusions of law at the start of the hearing, or shortly after its conclusion. While it is not improper for the judge to adopt many, or even most, of a party's proposed findings (see Kent v. Kent, 22 Mass. App. Ct. 340, 493 N.E.2d 537 (1986)), the judge should make it clear that he or she was "independently in command of the facts" (id. at 341, 493 N.E.2d at 538), and not merely rubberstamping the attorney's work product.

Care and Protection Standards
Standard 5:06

5:06 Adjudication. AFTER THE HEARING, THE COURT MUST EITHER ADJUDICATE THE CHILD IN NEED OF CARE AND PROTECTION OR DISMISS THE CASE. IF NECESSARY, TEMPORARY ORDERS MAY BE ENTERED WHILE FINDINGS ARE BEING WRITTEN OR WHILE THE COURT IS CONSIDERING DISPOSITIONAL OPTIONS.

COMMENTARY

From a legal perspective, the adjudication is the most significant step in the care and protection case. The adjudication amounts to a determination of whether the petition has merit, and, as such, should not be viewed as something that occurs at the "end" of a care and protection case, but, rather, near its inception.

Judges may sometimes attempt to accommodate the sensibilities of the parents by delaying this crucial determination. In reality, however, in most cases it is the dispositional order, rather than the adjudication, which will have the most tangible effect upon their lives. Moreover, as stated elsewhere in these standards, the Supreme Judicial Court has repeatedly reminded us of the special need to hear and dispose of these cases promptly:

No cases of any kind have a greater claim for expedition at all stages than those involving care and custody of children.

Custody of a Minor, 389 Mass. 755, 764 n.2, 452 N.E.2d 483, 489 n.2 (1983);

Once again we point out the inordinate length of time required for proceedings of this kind to move through the trial court.

Care and Protection of Three Minors, 392 Mass. 704, 705 n.3, 467 N.E.2d 851, 854 n.3 (1984);

Care and Protection Standards
Standard 5:06 (Cont'd)

. . . [T]he delay by the parents in prosecuting this appeal is inexcusable given the significant interests in the speedy resolution of custody matters.

Custody of Two Minors, 396 Mass. 610, 611 n.2, 487 N.E.2d 1358, 1360-1361 n.2 (1986).

The United States Supreme Court has also spoken on this point: "[C]hild-custody litigation must be concluded as rapidly as is consistent with fairness [footnote omitted]. . . ." Lassiter v. Department of Social Services, 452 U.S. 18, 32, 101 S. Ct. 2153, 2162 (1981).

Therefore, upon the completion of the trial, the judge must decide whether or not to adjudicate the child in need of care and protection. If the child is not in need of care and protection (i.e. the parents have not been found unfit), the case should be dismissed. It should not be continued generally, or "continued without a finding." If the evidence is insufficient to support an adjudication, the family should be permitted to be free from further state interference with their lives. If, on the other hand, the child is in need of care and protection, that decision should be made and recorded without delay.

While it is recognized that not every case should proceed immediately after the submission of the investigator's report to an adjudicatory hearing, it is important to decide whether the petition has merit before the nature of the problem has been clouded by the passage of time, particularly when intervening temporary custody orders have altered the situation which originally brought the parties to court. An early adjudication will not only justify the court's continuing intervention, but may help to shorten the "lifespan" of the case by encouraging early efforts at permanency planning. In addition, the first opportunity for parties who have been aggrieved by the issuance of temporary orders to appeal arises upon the entry of the adjudication. Finally, by holding the adjudicatory hearing at an early date, there will likely be fewer witnesses and shorter trials.

Once an adjudication has been entered on the docket, if written findings have not yet been made, they must be filed within ten days. This must occur regardless of the nature of the adjudication (i.e. even if the child was ultimately found not to be in need of care and protection) and whether or not any party has expressed an intention to appeal the decision.

Care and Protection Standards
Standard 5:06 (Cont'd)

"Final" dispositional orders may be entered simultaneously with, or shortly after, the adjudication. Temporary orders may be appropriate pending the issuance of written findings of fact or the final dispositional order. Where disposition has not yet been determined, the court should ensure that any time-limited temporary orders which may previously have been issued have not expired, and that, if necessary, new temporary orders be issued to retain the status quo pending final disposition of the matter.

It should be noted that the court has the responsibility to notify the child, parent, guardian or person appearing in behalf of the child of their right of appeal "at the time of adjudication and also at the time of commitment." (G.L. c. 119, s. 27.) Rule 2(b) of the Interim Supplemental Rules of Appellate Procedure in Care and Protection Cases directs that the clerk provide this notice by mail to "all parties" (presumably including the petitioner) immediately following the clerk's entry of the adjudication or commitment on the docket.

Care and Protection Standards
Standard 5:07

5:07 Orders. ONCE AN ADJUDICATION HAS BEEN MADE, G.L. c. 119, s. 26 AFFORDS THE COURT A WIDE RANGE OF DISPOSITIONAL OPTIONS REGARDING CUSTODY, PLACEMENT AND CARE OF THE CHILD. ALL ORDERS SHOULD BE ENTERED PROMPTLY.

COMMENTARY

Following an adjudication, whatever orders are made should be made promptly, and recorded on the docket (see Standard 3:05), while the evidence is still current. This will also permit the parties to decide whether or not to appeal the decision. Judges should also remember to (re)issue the "reasonable efforts" certification required by G.L. c. 119, s. 29C at this time, if custody is to be transferred to, or left with, the Department or its agent.

Once the court makes an adjudication, "the judge may commit the child to the . . . department until he becomes eighteen years of age . . . or make any other appropriate order with reference to the care and custody of the child as may conduce to his best interests" In addition to these broad powers under G.L. c. 119, s. 26, courts should be mindful of their powers of general equity jurisdiction under G.L. c. 218, s. 59 when fashioning their orders. A 1983 amendment to s. 59 provides that District Court juvenile sessions have "jurisdiction in equity concurrent with the supreme judicial court and the superior court department in all cases and matters arising under the provisions of chapter one hundred and nineteen." It would appear that this provision is actually intended to grant equitable powers, as opposed to "jurisdiction" in the legal sense, to judges in juvenile sessions.

Many of the considerations expressed in Standard 3:05 relative to the issuance of temporary orders prior to adjudication are equally applicable to the issuance of orders under s. 26, some of which warrant further discussion herein.

In considering dispositional alternatives, both the statutory definition of custody (as expressed in s. 21) and the ultimate goals to be served by care and protection proceedings (as partially expressed in s. 1) should be kept in mind. Proceedings should be conducted in a manner consistent with the belief that children's interests are generally best served by assuring them a continuous safe home with their parents.

Care and Protection Standards
Standard 5:07 (Cont'd)

Accordingly, where there is a possibility of improvement in the home situation, one option would be to permit the child to remain in the home, subject to whatever conditions might be necessary to ensure the child's safety, such as intensive monitoring, provision and acceptance of homemaker or other services, consistent school attendance, or obtaining necessary medical or psychiatric treatment for the child or parent.

Alternatively, in such cases where improvement may be possible but the home cannot presently be made safe, a temporary (as opposed to "permanent") custody order may be appropriate. Although there is little practical distinction between these two types of commitment orders, as both are appealable, neither is truly permanent (as only a decree under G.L. c. 210, s. 3 terminating parental rights results in a permanent deprivation of custody), and all cases may be subject to subsequent reviews (under, e.g., s. 21, 26 or 29B). However, a temporary order may be a more powerful incentive for a parent to make the changes necessary to regain custody, whereas a so-called permanent order may cause the parent to lose hope.

"Split custody" orders (phrased so as to give one party "legal custody" and another "physical custody") are to be avoided. As stated in Standard 3:05, if placement with a friend or relative is desirable but the court does not wish to vest that person with legal rights of custody, the preferable procedure would be to leave "custody" intact with one party (such as DSS), with an understanding that the child will be placed with a particular person, barring any material change in circumstances or subsequent problems with the placement. Any specific restrictions or directions as to placement should be clearly delineated in the order. This arrangement endows the custodian with the flexibility necessary to protect the child while complying with the court's order.

Because s. 21's definition of custody is so broad, it may sometimes be appropriate for the court to delineate which, if any, of the other s. 21 "custody powers" are to be vested in the person or agency with custody. As stated in Standard 3:05, the powers under subparagraph 3 (the right to consent to enlistments, marriages, and other contracts) are of a permanent nature, and are not frequently exercised by the Department or other foster care agencies, unless perhaps the child in question has been freed for adoption. As the Supreme Judicial Court has pointed out, "[e]ven after a parent has been deprived of child custody under c. 119, the parent retains such residual rights as the right to visit, G.L. c. 119, s. 35, to consent to adoption, G.L. c. 210, ss. 2-3, and to determine the child's religious affiliation, G.L. c. 119, s. 33." Custody of a Minor (No. 1), 377 Mass. 876, 884 n.7, 389 N.E.2d 68, 74 n.7 (1979).

Care and Protection Standards
Standard 5:07 (Cont'd)

It is the state's policy to strengthen and encourage family life, as articulated in s. 1. When children must be separated from their parents, relatives and extended family members should be considered as primary placement resources when possible, as discussed in Standard 3:05. In addition, the importance of attempting to preserve sibling relationships cannot be over-emphasized. In Care and Protection of Three Minors, 392 Mass. 704, 467 N.E.2d 851 (1984), the Supreme Judicial Court remanded a case in which the trial judge had committed three sisters to the Department, which intended to have the children raised in two different pre-adoptive homes, because the findings failed to show that the judge had considered the importance of preserving the sibling relationship, having instead merely issued a broad dispositional order committing the children to the Department. (See also Freeman v. Chaplic, 388 Mass. 398, 407-409, 446 N.E.2d 1369, 1375-1376 (1983), and Duclos v. Edwards, 344 Mass. 544, 546, 183 N.E.2d 708, 709 (1962)).

Care and Protection of Three Minors, ibid., also highlighted the need for judges to tailor their orders to the circumstances of each case, to address the various placement options, and to issue any appropriate conditions or limitations upon the orders, and thus to provide guidance to the Department as to furthering the best interests of the child. The Supreme Judicial Court also remanded this case for expansion of the order committing the children to the Department, stating that in such a case "where the children are aware of their mother, grandparents, and siblings, and where visitation has been significant and valuable in the past, the judge must include in his order some direction to the department that visitation shall continue or make findings that support his conclusion if he believes it should not." Id. at 718, 467 N.E.2d at 861.

As previously noted, the court must notify the child, parent, guardian or person appearing in behalf of the child of their right of appeal not only "at the time of adjudication," but also "at the time of commitment." Thus, if a commitment order is issued on a date subsequent to the entry of the adjudication, new notices must be issued to the parties by the clerk's office.

The entry of an adjudication, or even an order of commitment, does not signal the end of the case. As previously stated, further reviews may later take place under s. 21, 26 or 29B. In appropriate cases, the court may want the Department to file an updated service plan, setting forth the current goals of the parties in light of the court's order. The judge may also wish to schedule a review for a specific future date to make sure that the case is progressing and that any outstanding orders are being complied with.

5:08 Orders for Support. THE COURT MAY MAKE ORDERS FOR SUPPORT AND HEALTH INSURANCE ON BEHALF OF THE CHILD(REN), AND MAY ORDER THE PARENT(S) TO REIMBURSE THE COMMONWEALTH OR OTHER AGENCY FOR CARE.

COMMENTARY

Judges are authorized to make support orders in care and protection cases. The statutory basis for this is found both in s. 26 and s. 28. While the issue of support is not often raised in these proceedings, it may properly be the subject of judicial attention and activity.

Section 26 provides, simply, that "[i]n appropriate cases the court shall order the parents or parent of said child to reimburse the commonwealth or other agency for care." This authority appears to be limited to repayment of the actual cost of substitute care in given cases. Additionally, s. 26 permits the judge to order appropriate physical care, including medical or dental care. However, the focus here appears to be upon the actual provision of such care to protect the child, rather than financial reimbursement after the fact for the cost of treatment.

Section 28's support provisions, by contrast, are as broad as they are unclear. As this section was amended by chapter 310 of the Acts of 1986, which was, in effect, a comprehensive overhaul of the support laws, s. 28 must be read in conjunction with other sections of the General Laws, including but not limited to the following:

- G.L. c. 119A, s. 3(1),(4),(5);
- G.L. c. 209C, s. 3(a),(c),(e);
- G.L. c. 209C, s. 5; and
- G.L. c. 209C, s. 9(a),(c),(e).

Support proceedings under G.L. c. 119, s. 28 or under G.L. c. 209C differ from those under G.L. c. 119, s. 26 in that the court is not limited to issuing orders merely to reimburse the state or foster care agency for the expense of substitute care. Rather, orders under G.L. c. 119, s. 28 or G.L. c. 209C may exceed the actual cost of substitute care, or may be made on behalf of a child whose custody has not been transferred from the parent. In the latter case, the provision of support by the non-custodial parent to the custodial parent may be an important

Care and Protection Standards
Standard 5:08 (Cont'd)

factor which permits the child to remain in, or return to the home. Under G.L. c. 209C, and perhaps under G.L. c. 119, s. 28, orders for past (as well as current) support may be made, and this may include reimbursement to the Department of Public Welfare for past or current support of the child.

It would appear that s. 28 is designed for cases involving legitimate children, or those whose paternity is not in question, as there is no provision under s. 28 for adjudicating parentage in the context of a care and protection action. If the child was born out of wedlock and his or her paternity is in dispute, G.L. c. 209C proceedings would seem to be the appropriate route by which to seek orders for support and health insurance. (It is unclear whether a biological father who appears, participates and holds himself out to be the child's father in a care and protection matter, yet who has never been adjudicated the father or signed a formal acknowledgment of paternity, may properly be the subject of a support order under s. 28.) Once filed, a G.L. c. 209C action may be consolidated with a pending care and protection, although this is not necessary.

General Laws c. 119, s. 28 and G.L. c. 209C, s. 9(a) both require the judge, after entering a support order on behalf of a child not covered by a private group health insurance plan, to inquire as to whether the person ordered to pay support has such coverage available which may be extended to cover the child, and if so, to order such coverage.

Support orders entered pursuant to G.L. c. 119, s. 28 may, in the court's discretion, be issued in the form of an income assignment, and may be enforced in accordance with the provisions of G.L. c. 119A, s. 12. By contrast, support orders entered pursuant to G.L. c. 209C must be in the form of an income assignment and must otherwise conform to G.L. c. 119A, s. 12.

Standing to seek support under G.L. c. 119, s. 28 is broad, and may be claimed by any of the following: a parent, whether or not a minor; the child or the child's guardian, next of kin, or other person standing in a parental relation to the child; DSS or any licensed foster care agency, provided that the child is in their custody; or if the child is or was a recipient of any type of public assistance, by the Department of Public Welfare. Standing under G.L. c. 209C is quite similar, and reference should be made to s. 5, the corresponding portion of that chapter.

The "IV-D" (child support) agency, which is the Department of Revenue, is authorized to assist or represent most of the parties with standing to seek support. The agency may file an

Care and Protection Standards
Standard 5:08 (Cont'd)

action to establish paternity or seek support under G.L. c. 209C, and may intervene and appear in outstanding actions, including care and protections, to inform the court as to the commonwealth's financial interest in the action, or to enforce or modify any outstanding orders. (See G.L. c. 119A, s. 5(1) - (5).)

In cases involving presumptive fathers and children or parents who are or were recipients of public assistance, certain parties or agencies may be entitled to notice of the proceedings, and may also be entitled to mandatory or permissive joinder in the proceedings. Because the pertinent sections of the two statutes are somewhat contradictory, the reader should refer to G.L. c. 119, s. 28(b), and to G.L. c. 209C, s. 5(a), (b), and (c), as the need arises.

Support orders under both chapters may be entered notwithstanding the default of the person chargeable with support or his or her failure to appear personally. This authority should only be exercised if the person has been served with notice of the proceedings and of the request for support.

In determining the amount of current support to be paid, the court should apply the child support guidelines established by the Chief Administrative Justice of the Trial Court. (G.L. c. 119, s. 28(d); G.L. c. 211B, s. 15.) These guidelines were distributed on January 4, 1988 to all District Court judges (by District Court Transmittal No. 240) and clerk-magistrates (District Court Transmittal No. 241).

Orders for support remain in effect until they are dismissed or expire. Orders under G.L. c. 119, s. 28 expire either when the underlying care and protection petition is dismissed, or six months after any "final" order of commitment. At the time of such dismissal or commitment, the court must notify the parties and the IV-D agency of the expiration date of the support order or judgment. The expiration date of a G.L. c. 209C support order will be determined by the terms of the order and by the child's attainment of the age of majority. (Note, however, that Juvenile Court support orders under G.L. c. 209C expire in the same manner as do District Court support orders under G.L. c. 119, s. 28. Such orders may be transferred to, and then enforced and modified by, the District Court. See G.L. c. 209C, s. 3(e).)

It is recommended that consideration be given to conducting the support-related part of the care and protection case separately from the underlying proceedings, particularly in cases involving the participation of "outsiders" who would normally be excluded from the proceedings. This will help to maintain the

Care and Protection Standards
Standard 5:08 (Cont'd)

privacy of the family by narrowing the issues and limiting access to sensitive testimony concerning the abuse or neglect of the child who is the subject of the petition. If no third parties are involved, however, it may be preferable to consolidate the proceedings to save the parties from having to make repeated court appearances.

REVIEW AND APPEAL

6:00	Reviews
6:01	Section 21
6:02	Section 26
6:03	Section 29B
6:04	Other Reviews and General Considerations
6:05	Appeal

Care and Protection Standards
Standard 6:00

6:00 Reviews. GENERAL LAWS c. 119 CONTAINS A VARIETY OF PROCEDURAL MECHANISMS BY WHICH A CARE AND PROTECTION CASE MAY BE ADVANCED FOR JUDICIAL REVIEW.

COMMENTARY

In keeping with the general principle that child custody orders may always be modified if warranted by a change in circumstances or if conducive to the child's best interests, G.L. c. 119 contains provisions for a number of different types of review which may be sought by the parties or initiated by the court.

Reviews under s. 21, s. 26, s. 29B, and on scheduled continuance dates may vary in timing, focus, scope and participants. Regardless of the type of review, however, the basic considerations relative to rules of evidence, standard of proof, nature of unfitness, and issuance of written findings, as expressed in Standards 5:02 through 5:06, should be kept in mind when conducting any such reviews.

6:01 Section 21 - Custody Reviews. GENERAL LAWS c. 119,
s. 21 PROVIDES THAT IF A PARENT OR GUARDIAN OBJECTS TO THE
CARRYING OUT OF THE "CUSTODY"-POWERS ENUMERATED IN THAT SECTION,
HE OR SHE MAY APPLY TO THE COMMITTING COURT FOR REVIEW OF THE
MATTER.

COMMENTARY

This review may be sought by a parent or guardian who objects to the manner in which the person or agency to whom the court awarded custody is exercising that authority. There is no statutory limit on the frequency or number of reviews that may be sought under this section, and it would appear that both pre- and post-adjudicatory cases with either temporary or permanent custody orders may be reviewed under s. 21. In effect, the parent or guardian asks the judge to review the propriety of the actions of the child's custodian, usually the Department.

The statute directs that upon such application by the child's parent or guardian, the "court shall review and make an order on the matter."

6:02 Section 26 - Review and Redetermination of Needs.

GENERAL LAWS c. 119, s. 26 PERMITS CERTAIN NAMED PERSONS OR THE DEPARTMENT OF SOCIAL SERVICES TO PETITION THE COURT NOT MORE THAN ONCE EVERY SIX MONTHS FOR A REVIEW AND REDETERMINATION OF THE CURRENT NEEDS OF THE CHILD.

COMMENTARY

A much broader selection of persons have standing to seek a s. 26 review than a s. 21 review. Section 26 provides that "On any petition filed . . . pursuant to this section, the department, parents, person having legal custody of, counsel for a child, the probation officer, guardian or guardian ad litem may petition the court not more than once every six months for a review and redetermination of the current needs of (the) child whose case has come before the court." (Whether non-DSS petitioners have standing to seek a s. 26 review is an open question. See Custody of a Minor, 385 Mass. 697, 707 n.7, 434 N.E.2d 601, 607 n.7 (1982).) Although the statutory language is broad, this type of review is generally considered to apply to cases in which an adjudication has already been made. Thus, the same section which provides for "permanent" commitments to age 18 may also be used to modify such orders, as circumstances warrant. It would seem that each of the enumerated parties would have an independent right to seek such a review every six months. However, regardless of which party is seeking the review, the focus is upon the child's and parents' current situations, rather than upon facts which have already been litigated.

The Appeals Court, in the 1982 case of Custody of a Minor, 13 Mass. App. Ct. 66, 430 N.E.2d 840, held that a "redetermination" in a s. 26 review was the same as a "readjudication" for purposes of vesting a party with the right to a de novo appeal under the former s. 27. (Presumably, this would also provide a basis for an appeal under the existing version of s. 27.) Therefore, the judge should issue new findings of fact and, if necessary, a new order following each s. 26 review.

The Appeals Court provided further guidance as to the conduct of s. 26 hearings and the need for issuing new findings in the recent case of Custody of a Minor (No. 2), 22 Mass. App. Ct. 91, 491 N.E.2d 283 (1986). As previously stated, the judge

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Standard 6:02 (Cont'd)

in a s. 26 review must issue new findings with respect to current parental unfitness. However, the review does not start with a 'blank slate.' Rather, each review and successive set of findings builds upon earlier stages of the case. Facts that have been litigated are not relitigated. "The proper focus of inquiry on a s. 26 review is on those facts which have undergone some metamorphosis since the previous order or are newly developed and, in consequence, alter the relationship between the biological parent and the child." Id. at 94, 491 N.E.2d at 285. However, the Appeals Court rejected the notion that a judge must find that a material change in circumstances has occurred before altering custodial arrangements, stating instead that even the lack of changed circumstances (e.g. a lack of improvement in the home situation or the parent-child relationship) may be a sound basis for altering the court's order.

6:03 Section 29B - Substitute Care Reviews. GENERAL LAWS

c. 119, s. 29B REQUIRES REGULAR COURT REVIEWS OF CASES OF CHILDREN IN SUBSTITUTE CARE. THESE REVIEWS ARE ALSO REFERRED TO AS "SUBSTITUTE CARE REVIEWS."

COMMENTARY

Section 29B was added to the General Laws in 1984 in response to the federal Adoption Assistance and Child Welfare Act of 1980 (P. L. 96-272), and was designed to address and prevent the problem of "foster care drift." Foster care drift may be described as the failure of the state, once it has stepped in and removed a child from the custody of the parents, to develop a permanent plan for the child. It may be reflected by repeated short-term foster care placements, lack of follow-through on plans for guardianship or adoption, loss of contact between children and their biological families due to agency inaction, and so on. By increasing the scope and extending the duration of the court's involvement in each case through the provisions of s. 29B, it is expected that there will be a decrease in the number of children remaining unnecessarily in foster care and a rise in the number of adoptions and the number of committed children who return to their biological families.

Unlike reviews under other sections of G.L. c. 119, therefore, a s. 29B review takes place automatically, whether or not the judge or any of the parties requests it. Section 29B, as appearing in the 1986 Official Edition, provides in part as follows:

Within eighteen months of the original commitment, grant of custody or transfer of responsibility of a child to the department by a court of competent jurisdiction and every twelve months thereafter while the child remains in the care of the department, the committing court shall reconvene . . . to determine the future status of the child

Cases which must be reviewed under s. 29B are those in which:

1. there is an outstanding court order granting custody of a child to DSS; and

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Standard 6:03 (Cont'd)

2. the child remains in substitute care (i.e. is not residing with the parents and is in placement through the auspices of DSS); and
3. the child has not been adopted or had custody transferred to a legal guardian or custodian other than DSS; and
4. the child is still under the age of eighteen.

All proceedings are governed by Trial Court Rule VI, "Uniform Rules for Substitute Care Review Hearings," so that the procedure for conducting reviews is identical in the district, probate, and juvenile courts.

In general, the parties to the original action will be the parties to the s. 29B review. However, if a child has been freed or surrendered for adoption but not yet adopted, the review must still take place but the parents will not be entitled to notice. (Rule VI(4)(D).) Parties retain all applicable rights to counsel at this stage of the proceedings.

The focus of the review should be upon the suitability of the terms and the implementation of the Department's service plan for the child, rather than upon factors which led to the custody order or issues which have already been litigated. Section 29B directs the court to determine the future status of the child, and, in effect, to determine whether the Department's goals, as reflected in the service plan, are consistent with the child's best interests. A range of possibilities, such as a return to the parents, the appointment of a guardian, or the provision of long-term substitute care in a particular placement is listed in the statute. The court must also ensure that the plan is being actively pursued by the Department, and that the Department is otherwise living up to its responsibilities as the child's custodian.

After the hearing, the court may approve or disapprove the Department's plan in whole or in part, and may (but need not) make any appropriate orders which are tailored to promote the child's best interests.

All parties have a right of appeal from the court's decision. The appeal must be claimed within ten days following the determination or order. The scope of review in such an appeal is limited to abuse of judicial discretion.

6:04 Other Reviews and General Considerations. IN ADDITION TO THE SPECIALIZED REVIEWS ALREADY DISCUSSED, OTHER TYPES OF REVIEW MAY BE APPROPRIATE. IN GENERAL, THE COURT SHOULD NOT HESITATE TO ENTERTAIN ANY NON-FRIVOLOUS REQUEST FOR REVIEW, REGARDLESS OF THE TYPE OF REVIEW WHICH IS SOUGHT.

COMMENTARY

All of the types of review previously discussed are initiated either by request of one of the parties, or, in the case of s. 29B reviews, by statutory mandate. However, the judge also may wish to schedule a care and protection matter for a "general" review after a specified period of time, especially within the first 18-month period following the initial custody order, during which time no s. 29B review would normally be scheduled. This general review might be warranted in either pre- or post-adjudicatory stages.

The focus of such a review might be to reassess the status of the case after a continuance, to determine how the child is adapting to an initial placement, to ensure that there has been compliance with all terms of the order, or to reexamine the current needs of the child at any point in time. This review may also present an opportunity for the court to acquaint itself with the terms and status of the current service plan. However, if a hearing has been held within the past six to twelve months pursuant to any of the statutory review provisions, it would seem that further review in the near future without any specialized purpose would be unnecessary in most cases. Of course, any case should be advanced upon request if an emergency should arise.

So long as reviews are not being frivolously requested by parties who are unhappy with the court's decision, they should be liberally granted. The Supreme Judicial Court has stated several times that strict procedural requirements should not be used to prevent review of these cases. Thus, in Custody of a Minor (No. 2), 392 Mass. 719, 726-727 n.8, 467 N.E.2d 1286, 1291 n.8 (1984), superseding 17 Mass. App. Ct. 1109, 459 N.E.2d 840 (1984), the court stated that " . . . we seriously question whether the bringing of an appeal in a care and protection case precludes the parents from being heard on a petition for review and redetermination, as provided for in G.L. c. 119, s. 26, pending

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the appeal. This view is consistent with the need to preclude legal technicalities from acting as a barrier to the prompt and fair disposition of cases involving children."

While the scheduling of so many potential reviews may appear burdensome in terms of court and personnel time, given the importance of the subject matter, frequent reviews as a type of monitoring, as a means of discovering developing crises, or as a vehicle by which to encourage the development of a permanent plan for the child would seem to be most worthwhile.

6:05 Appeal. PURSUANT TO G.L. c. 119, s. 27, AN APPEAL MAY BE TAKEN FROM AN ADJUDICATION AND FROM ANY ORDER OF COMMITMENT MADE AS A RESULT OF THE ADJUDICATION.

COMMENTARY

Section 27 affords a right of appeal to the child, parent, guardian or person appearing in behalf of the child, or the Department. Petitioners other than the Department do not appear to have standing to claim an appeal under this section. Although the statute speaks of appealing "from the adjudication" and "from any order of commitment made as a result of the adjudication," in Custody of a Minor (No. 2), 386 Mass. 460 at 463, 436 N.E.2d 392 at 394-395 (1982), the Supreme Judicial Court held that the Department may appeal an adjudication that a child is not in need of care and protection.

Commitment orders may be entered or remain in effect pending appeal. In addition, the trial court retains jurisdiction, pending appeal, to "enter any order for the needs of the child."

As with most other types of District Court civil cases, appeals on questions of law proceed by way of draft report. However, jurisdiction of care and protection appeals lies with the Appeals Court, rather than the Appellate Division. (Note that there is no right to a trial de novo.) Additionally, most of the early stages of a care and protection appeal are governed by the Interim Supplemental Rules of Appellate Procedure in Care and Protection Cases (ISRAP), rather than the Massachusetts Rules of Appellate Procedure (MRAP). (Under the provisions of ISRAP 1, procedures which are not prescribed by ISRAP shall be governed by MRAP.)

Thus the contents, filing, and deadline for a "claim of appeal" are governed by ISRAP 2. After a claim of appeal is filed, a "draft report" must be prepared by the appealing party, and finally "settled" by the trial judge. See ISRAP 3. Thereafter, the record is assembled (including the settled draft report) pursuant to the requirements of ISRAP 7, and transmitted to the Appeals Court. A notice that the record has been assembled is issued by the trial court clerk's office at this time. MRAP 9. The appeal is thereafter docketed in the Appeals Court (MRAP 10) and notice of docketing is issued to all parties by the Appeals Court clerk's office. Briefs of both parties

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Standard 6:05 (Cont'd)

follow (MRAP 16, 18, 19 and 20), then oral argument (MRAP 22), and finally, after the Appeals Court decision is issued, the possibility of further appellate review may be considered (MRAP 27.1).

There are a number of sources of possible delay in the care and protection appeal process. If the judge does not issue speedy findings of fact, the record cannot be assembled and the appeal cannot go forward. If the appealing party does not prepare and submit his or her proposed draft report, or if the trial judge fails to promptly settle the draft report, the appeal similarly cannot go forward. These and other delays are detrimental to the best interests of the children involved in the appeal, and the court and all parties should strive to eliminate such delays. See Custody of a Minor, 389 Mass. 755, 764, 452 N.E.2d 483, 488-489 (1983): "Unless proceedings involving the custody of a minor are expedited, they fail to accomplish their purpose. . . . Prompt resolution of custody issues is essential." See also Lassiter v. Department of Social Services, 452 U.S. 18, 32, 101 S. Ct. 2153, 2162 (1981): "[C]hild-custody litigation must be concluded as rapidly as is consistent with fairness [footnote omitted]. . . ." See also Custody of Two Minors, 396 Mass. 610, 611 n.2, 487 N.E.2d 1358, 1360-1361 n.2 (1986): "The statutory requirement for a draft report should not be used as an instrument to delay and frustrate the progress of litigation."

The tape recording of the trial is the official record in a care and protection appeal (see G.L. c. 218, s. 27A(h)), and the draft report the vehicle by which to bring the case before the Appeals Court. While a transcript made from the tape recording is therefore not necessary in order to proceed with the appeal, it is nevertheless sometimes useful or requested by one or more of the parties or the judge. Because of this, when it is known or anticipated that a care and protection matter has been or may be appealed, care should be taken that the trial tapes are not erased or destroyed until the appeal is concluded. (See also, Standard 2:09.) (MRAP 8(b)(3), while perhaps not strictly applicable to care and protection appeals, may nevertheless be helpful if a decision is made to obtain a transcript.)

It should be noted that, although s. 27 only pertains to appeals of post-adjudicatory rulings, a party may still attempt to seek interlocutory relief at an earlier stage pursuant to G.L. c. 211, s. 3. As with other types of cases, these situations should be rare.

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Standard 6:05 (Cont'd)

Additionally, a child, parent, guardian or the Department may appeal to the Appeals Court from a judge's determination or order following a s. 29B substitute care review. Such appeals must be filed within ten days following the order. Unlike appeals under s. 27, these appeals are conducted entirely under MRAP rather than ISRAP. As the scope of appellate review is limited to abuse of judicial discretion, these appeals should be infrequent.

MISCELLANEOUS

7:00	Medical Authorizations
8:00	Transfer of Cases
9:00	Standards Applicable if Care and Protection Consolidated with Other Pending Action

7:00 Medical Authorizations. IF THE COURT HAS COMMITTED A CHILD TO THE CUSTODY OF THE DEPARTMENT OF SOCIAL SERVICES OR TO PERSON(S) OTHER THAN BIOLOGICAL PARENTS, CERTAIN MEDICAL PROCEDURES REQUIRE COURT APPROVAL.

COMMENTARY

In a medical emergency, no one's consent is required in order to allow a child to receive necessary medical care. G.L. c. 112, s. 12F. For routine medical matters (such as allergy shots, blood tests, dental care, treatment of fractures, etc.), the court's custody order permits the court-ordered custodian (i.e. the Department of Social Services or other entity or individual) to authorize treatment. See G.L. c. 119, s. 21.

However, several types of medical procedures that are neither "emergency" nor "routine" require court authorization:

- (A) Abortion. Authorization must be obtained from the Superior Court pursuant to G.L. c. 112, s. 12S. The District Court does not have jurisdiction to issue this type of order.
- (B) "No code" orders. ("No code" order means a medical order regarding a terminally ill patient directing a hospital and its staff not to use heroic medical efforts in the event of cardiac or respiratory failure.) See Custody of a Minor, 385 Mass. 697, 434 N.E.2d 601 (1982).
- (C) Antipsychotic Drugs. ("Antipsychotic drugs" means drugs which are used in treating psychosis.) Except for emergency treatment, prior judicial approval is needed before antipsychotic drugs can be administered to a child whose custody has been removed from the biological parents by court order. See Rogers v. Commissioner of the Department of Mental Health, 390 Mass. 489, 458 N.E.2d 308 (1983). The District Court has express statutory authority to handle these matters under G.L. c. 123, s. 8B.

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Standard 7:00 (Cont'd)

- (D) Other Extraordinary Medical Treatment.
(Such treatment includes but is not limited to complex, risky, or novel procedures, procedures with serious or permanent side effects, etc.) Prior judicial approval is needed for such extraordinary medical treatment for a child whose custody has been removed from the biological parents by court order. (See In the Matter of Moe, 385 Mass. App. Ct. 555, 432 N.E.2d 712 (1982), as to guardians; In the Matter of Spring, 380 Mass. 629, 405 N.E.2d 115 (1980) as to general determination of the need for court approval; and 110 CMR 11.17(2), as to the Department's obligation to obtain prior judicial approval.)

Further specifics as to obtaining the consent of the child, parent or Department for various types of medical treatment on behalf of a child in DSS custody may be found in Chapter 11 of the Department's regulations (110 CMR 11:00 et. seq.). This chapter covers such topics as family planning services, drug dependency, venereal disease, shock treatment, commitments to mental health facilities, and autopsies.

The judge's power to authorize or withhold medical treatment on behalf of a child under the court's jurisdiction also exists independently of any specific statutory authorization outside of Chapter 119. In Custody of a Minor, supra, the Supreme Judicial Court affirmed the Juvenile Court's authority to make decisions concerning medical treatment for an abandoned child placed in DSS custody through a care and protection proceeding, and emphasized the propriety of bringing such proceedings for this purpose. The court has the ultimate authority to make treatment decisions, even if all parties agree to a contrary position. ". . .[T]he fact that the parties to the legal proceeding previously initiated come to agreement, while it is to be given deference, neither defeats the jurisdiction of the court in a case such as this nor binds it to accept their position." Custody of a Minor, 385 Mass. 697, 709, 434 N.E.2d 601, 608 (1982). In making such determinations, particularly on behalf of young children, the court should be guided coextensively by the substituted judgment doctrine and the "best interests of the child" test. See Custody of a Minor (No. 3), 378 Mass. 732 at 745, 393 N.E.2d 836, 844 (1979).

As to a judge's ability to prevent the release of a child from a hospital, see G.L. c. 119, s. 51C, and Standard 2:07.

8:00 Transfer of Cases. CARE AND PROTECTION CASES MAY NOT BE TRANSFERRED FROM ONE DIVISION TO ANOTHER. WHERE CIRCUMSTANCES REQUIRE, HOWEVER, HEARINGS MAY BE CONDUCTED BY SPECIAL ASSIGNMENT IN OTHER LOCATIONS.

COMMENTARY

There appears to be no authority by which to transfer a care and protection case from one division to another. At times, however, it may become burdensome for the parties to continue appearing at the court in which the case was filed when there is no longer any substantial connection with that geographical jurisdiction. This may happen, for example, when a family relocates to another part of the state, or when case responsibility is transferred to a geographically distant DSS office.

In such instances, the provisions of G.L. c. 218, s. 43A may be utilized and the case, although still a case of the primary court, may be heard in a different, more convenient location. It is important that this distinction be noted, for all docket entries must be made (or duplicated) in the primary court, and it is the primary court through which any legal process such as a summons or a mittimus must issue.

General Laws c. 218, s. 43A, as amended by St. 1987, c. 119, permits the Chief Justice of the District Court to "authorize any justice . . . to hold a session of any division at another division or elsewhere" This authority was delegated to the Regional Administrative Judges by Administrative Regulation No. 2-87. The request for such a transfer should be initiated by the judge hearing the case in the primary court. (This may be prompted by a motion of one of the parties to the action.) The request should be directed to the Regional Administrative Judge of the proposed "receiving" region. The regional judge, in approving the request, may then authorize any justice (including the one hearing the case in the primary court) to hold a session of the primary court in the receiving court.

This procedure is one that should be approached with caution, and used sparingly in the context of care and protection cases. Depending upon the stage of the case and any orders that may already have issued, parties may attempt to use this

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Standard 8:00 (Cont'd)

procedure as a means of forum-shopping, to avoid further adverse action by a particular judge. Also, the nature of these cases is such that they often involve parents who move from place to place on a frequent basis, which may even be one of the factors which gave rise to the filing of the petition. Obviously, the case cannot be permitted to be shifted from one court to another each time this occurs.

The need for case continuity cannot be over-stressed. It is only in those rare cases in which all or most of the parties and critical witnesses (such as investigators or foster parents) would find the new location much more convenient that a request under s. 43A should be made or approved.

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Standard 9:00

9:00 Standards Applicable if Care and Protection Consolidated with Other Pending Action. CARE AND PROTECTION CASES MAY BE CONSOLIDATED WITH OTHER PENDING ACTIONS. IN SUCH SITUATIONS, THESE STANDARDS SHOULD BE OBSERVED, AND THE PARTIES RETAIN ALL EXISTING PROCEDURAL AND SUBSTANTIVE RIGHTS AND RESPONSIBILITIES WHICH WOULD NORMALLY APPLY IN A CARE AND PROTECTION CASE. SEPARATE FINDINGS AND ORDERS MUST BE ISSUED FOR EACH OF THE ACTIONS WHICH HAS BEEN CONSOLIDATED.

COMMENTARY

District Court care and protection cases may sometimes be consolidated, either formally or informally, with other pending cases. This may occur with cases filed and pending in the same division or in different divisions of the District Court, or as a result of an interdepartmental assignment.

Generally speaking, the only time a judge should consider consolidating a care and protection with another matter which is pending in the same division is when the cases involve related parties, and the same or basically similar issues. The most likely type of case to be joined with a care and protection in this manner would be a CHINS petition. For example, parents may file a CHINS petition against a child who is already the subject of a care and protection petition, or vice versa. By scheduling both cases together, common issues may be sorted out more effectively, and the court may be able to dispose of one of the petitions in its early stages.

On an interdepartmental basis, a district court judge may be assigned under G.L. c. 211B, s. 9 to sit as a Juvenile or Probate Court judge in order to hear a case which is related to a pending District Court care and protection. This may include another care and protection involving siblings, a guardianship petition, a petition to dispense with parental consent to adoption, or adoption proceedings. (The request for consolidation may be made by a judge, clerk-magistrate, probate court register, or party to an action, and must be addressed to the chief justices of the

Care and Protection Standards
Standard 9:00 (Cont'd)

departments in which the cases are pending. The chief justices then forward the requests, together with their respective recommendations, to the Chief Administrative Justice, who makes the final decision and assignment, if any. For further specifics as to the procedure for requesting a consolidation, please see the editorial note to both the Lawyer's Co-operative Publishing Co. and the West Publishing Co. annotated versions of G.L. c. 211B, s. 9 which reprint an informational memorandum of the Chief Administrative Justice on this subject.) (A copy of this memorandum also appears in the Appendix to these standards.) When hearing a Probate Court case, a District Court judge should be mindful of the fact that the Probate Court Rules and the New Uniform Practices of Probate Courts (in particular, Practices X, Xa, and Xb), both of which may be found in West's Massachusetts Rules of Court (1987), may apply to various stages of the proceedings. (A copy of these rules has also been included in the Appendix to these standards.)

Judges hearing consolidated cases should determine, on a case-by-case basis, the most appropriate manner by which to receive the evidence. Some cases would best be heard simultaneously, while others may require a bifurcation at some point in the presentation. For example, in a care and protection consolidated with a CHINS, a social worker's testimony might be privileged under G.L. c. 112, s. 135 for purposes of the CHINS, but not for the care and protection. (It is unclear whether a CHINS matter would be considered a "child custody" case for purposes of invoking either the exception under G.L. c. 112, s. 135(e) to the social worker privilege, or the exception under G.L. c. 233, s. 20B(e) to the psychotherapist privilege. Given the reasoning in Petition of Catholic Charitable Bureau to Dispense with Consent to Adoption, 392 Mass. 738, 467 N.E.2d 866 (1984), however, it would appear doubtful. Therefore, it is likely that both privileges must be observed in hearing CHINS cases.) A judge might therefore wish to hear this testimony at a later stage of the hearing, and would have to avoid reliance upon or reference to it when reaching a decision and issuing findings on the CHINS portion of the case.

Care and protection cases which are consolidated with other cases must be conducted in the same manner, with respect to the observance of any applicable rights, required procedures, rules of evidence and burden of proof, as would any other care and protection case. For example, the parties retain their rights to notice, participation, counsel and review. All proceedings should be tape recorded, whether or not a stenographer is used. An investigator must be appointed under s. 21, although the same person may also be appointed to perform a dual function, such as

Care and Protection Standards
Standard 9:00 (Cont'd)

that of GAL in a G.L. c. 210, s. 3 proceeding to terminate parental rights. The care and protection part of the case must be proven by clear and convincing evidence of parental unfitness, and the judge must issue a separate set of specific and detailed findings of fact, as required by the terms of the order usually issued by the Chief Administrative Justice of the trial court when approving the consolidation. (While some or all of the individual care and protection findings may also be used as findings for the other part of the case, the judge will most likely have to draw and issue different sets of conclusions of law which acknowledge the respective legal standards which must be applied.) A separate order should be made for each case, and separate case folders, files and records should be maintained.

APPENDIX A

Form for reporting cases of abuse or neglect
pursuant to G.L. c. 119, s. 51A

REPORT OF CHILD(REN) ALLEGED TO BE SUFFERING FROM SERIOUS
PHYSICAL OR EMOTIONAL INJURY BY ABUSE OR NEGLECT

Please complete all sections of this form. If some data is unknown, please signify. If some data is uncertain, place a question mark after the entry.

	<u>NAME</u>	<u>CURRENT LOCATION/ADDRESS</u>	<u>SEX</u>	<u>AGE OR DATE OF BIRTH</u>
1)			<input type="checkbox"/> Male <input type="checkbox"/> Female	
2)			<input type="checkbox"/> Male <input type="checkbox"/> Female	
3)			<input type="checkbox"/> Male <input type="checkbox"/> Female	
4)			<input type="checkbox"/> Male <input type="checkbox"/> Female	
5)			<input type="checkbox"/> Male <input type="checkbox"/> Female	

Name: _____
First Last Middle

Address: _____
Street and Number City/Town State

Telephone Number: _____ **Age:** _____

Name: _____
 First **Last** **Middle**

Address: _____
 Street and Number **City/Town** **State**

Telephone Number: _____ **Age:** _____

Date of Report

☐ Mandatory Report ☐ Voluntary Report

Reporter's Name: _____

First Last

Reporter's Address: (If the reporter represents an institution, school, or facility please indicate.)

Street City/Town

State Zip Code Telephone Number

Has reporter informed caretaker of report? ☐ YES ☐ NO

What is the nature and extent of the injury, abuse, maltreatment or neglect, including prior evidence of same? (Please cite the source of this information if not observed first hand.)

What are the circumstances under which the reporter became aware of the injuries, abuse, maltreatment or neglect?

What action has been taken thus far to treat, shelter or otherwise assist the child to deal with this situation?

Please give other information which you think might be helpful in establishing the cause of the injury and/or the person responsible for it. If known, please provide the name(s) of the alleged perpetrator(s).

Signature of Reporter

APPENDIX B

Affidavit disclosing care or custody proceedings
pursuant to Uniform Trial Court
Rule IV: Form and Rule

AFFIDAVIT DISCLOSING CARE OR CUSTODY PROCEEDINGS

TRIAL COURT OF MASSACHUSETTS



DOCKET NUMBER

Pursuant to Trial Court Rule IV

Name Of Case _____

☐ Boston Municipal Court

☐ District Court

☐ Juvenile Court

☐ Probate & Family Court

☐ Superior Court

Division _____

Division _____

Division _____

County _____

Section 1 I, _____, hereby declare, to the best of my knowledge, information, and belief that all the information on this form is true and complete:

NAME OF PARTY (PRINT)

Section 2 The name(s) of the child(ren) whose care or custody is at issue in this case are:
A. _____ B. _____ C. _____
(LAST, FIRST) (LAST, FIRST) (LAST, FIRST)
Use only the letter appearing in front of the child's name above when referring to that child in completing the remaining sections.

Section 3 The party filing this affidavit may request certain addresses to be kept confidential if the address is a shelter for battered persons and their dependent child(ren), or the party filing this affidavit believes that he/she or the child(ren) are in danger of physical or emotional abuse, or the party is filing an action under G.L.c.209A. If you believe that this provision applies to you, check the box at the right, complete sections 10 and 11 on the reverse side of this page and DO NOT complete sections 4 and 5 below. ☐

Section 4 The address(es) of the above-named child(ren) whose care or custody is at issue in this case are:
Address(es) _____ Address(es) During Last 2 Years, If Different _____

CHILD A. _____
CHILD B. _____
CHILD C. _____

Section 5 My address is: _____

Section 6 I ☐ have ☐ have not participated in and I ☐ know ☐ do not know of other care or custody proceedings involving the above-named child(ren) in Massachusetts or in any other state or country.

Certified copies of any pleadings or determinations in a care or custody proceeding outside of Massachusetts listed in sections 7 and 8 must be filed with this affidavit unless already filed with this court or an extension for filing these documents has been granted by this court.

Section 7 The following is a list of all pending or concluded proceedings I have participated in or know of involving the care or custody of the above-named child(ren):

Letter of Child	Court	Docket No.	Status of Case (Custody awarded to) (Date of award)	Witness Party Other None
CHILD _____	_____	_____	_____	[]
CHILD _____	_____	_____	_____	[]
CHILD _____	_____	_____	_____	[]

Section 8 The names and addresses of parties to care or custody proceedings involving any of the above-named child(ren) or those claiming a legal right to these child(ren) during the last two years (not including myself) are:

Letter of Child	Name of Party/Claimant	Current (or last known) Address of Party/Claimant
CHILD _____	_____	_____
CHILD _____	_____	_____
CHILD _____	_____	_____

Section 9 If the box at the right is checked, this affidavit discloses the adoption of one or more of the above-named child(ren) and I am requesting the court to impound this affidavit. See instructions. ☐

This affidavit must be personally signed by the party listed in section 1 above, unless he/she is under 18 years of age or has been adjudged incompetent in which case the attorney of record must sign. A revised affidavit must be filed with the court if new information is discovered subsequent to this filing.

Signed this _____ day of _____, 19____ under the penalties of perjury.

X

SIGNATURE OF PARTY OR ATTORNEY OF RECORD FOR INCOMPETENT/JUVENILE

PRINTED NAME OF PERSON SIGNING

ADDRESS OF ATTORNEY OF RECORD FOR INCOMPETENT/JUVENILE

THE PARTY FILING THIS AFFIDAVIT MUST FURNISH A COPY OF IT TO ALL OTHER PARTIES TO THIS ACTION.

COURT'S COPY

READ BEFORE COMPLETING AFFIDAVIT

A. WHAT IS AN "AFFIDAVIT DISCLOSING CARE OR CUSTODY PROCEEDINGS"?

It is a document signed under the penalties of perjury which lists information required by Trial Court Rule IV concerning the child(ren) involved in a care or custody proceeding.

B. WHO MUST FILE THIS AFFIDAVIT?

The party to a petition (including a modification petition) or complaint involving the care or custody of a child pursuant to G.L. c. 119 (except delinquency actions under G.L. c. 119), G.L. c. 201, G.L. c. 208, G.L. c. 209, G.L. c. 209A, G.L. c. 210, or any other provision of law concerning the care or custody of a child must file this affidavit.

This affidavit **must be signed by the party**, unless the party is under 18 years of age or has been adjudged incompetent, in which case the attorney of record must sign this affidavit on behalf of the juvenile or incompetent party.

C. WHEN MUST THIS AFFIDAVIT BE FILED?

The person filing the petition or complaint must file this affidavit at the time of filing, and the other party must file this affidavit with the first pleading.

This affidavit should be filed upon issuance of a CHINS petition pursuant to G.L. c. 119, not upon application for such a petition.

This affidavit need not be filed if the petition or complaint is for **support only**.

D. WHERE MUST THIS AFFIDAVIT BE FILED?

The completed affidavit must be filed, in person or by mail, with the Clerk-Magistrate or Register of Probate in the court in which this action is being brought.

E. WHEN MUST A REVISED AFFIDAVIT BE FILED?

A revised affidavit must be filed with the Clerk-Magistrate or Register of Probate if new information is discovered subsequent to the filing of this affidavit.

F. WHAT MUST BE FILED AS PART OF THIS AFFIDAVIT?

Certified copies of each pleading and of any determination entered in a foreign country or in a state other than Massachusetts must be filed with this affidavit unless these documents are on file with the court in this case, or an extension has been granted by the court for filing these documents.

INSTRUCTIONS FOR COMPLETING AFFIDAVIT

When completing this affidavit if additional space is needed for any of the sections, attach a separate sheet which includes your name (printed), the docket number and the sections to which you are referring. You must also sign and date the sheet.

The party filing this affidavit **must** complete the section entitled "Name of Case" and indicate the Court Department and Division in which the case is being brought. The docket number should also be listed, if known.

DO NOT COMPLETE SECTIONS 2, 3, 4, 8 AND 10 IF THIS AFFIDAVIT IS BEING FILED WITH A PETITION FOR ADOPTION.

- | | |
|-----------------------------|---|
| Section 1 | You must print your first and last name. If this affidavit is being filed by an attorney on behalf of an incompetent person or juvenile, the name of the party on whose behalf this affidavit is being completed must be listed. |
| Section 2 | List the names of all child(ren) involved in this care or custody proceeding. All future references to the child(ren) listed in this section should be with the letter in front of the child's name (e.g. If John Smith is listed next to the letter A, all future references to John Smith will be as Child A). |
| Section 3 | Check the box if this section applies to you. If this box is checked, do not complete Sections 4 and 5 . You must complete Sections 10 and 11 on the reverse side of page 1. |
| Sections 4 & 5 | List the present and all prior addresses during the last two years of the above-named child(ren) and your present address. If legal custody of a child has been awarded to a social service agency, list the name and address of the agency with legal custody. |
| Section 6 | Check the appropriate boxes. |
| Section 7 | List all pending or concluded proceedings which you have participated in or know of involving the care or custody of the child(ren) named in this affidavit. Indicate the letter of the child; the court in which the case was heard; the docket number; the person(s) to whom custody was awarded and the date of the award; and the nature of your participation in the proceeding by listing "W" for witness, "P" for party, "O" for other or "N" for none. If specific information required in this section is not known, you or your attorney should contact the court where the case was heard to obtain such information. In the case of a petition for adoption, list all information except the person(s) to whom custody was awarded, the date of the award and the nature of your participation. Under the heading "Status of Case", indicate the type of case. |
| Section 8 | List the name(s) and current residential address(es), if known, otherwise the last known address(es) of parties to care or custody proceedings or persons claiming a legal right to the above-named child(ren) during the last two years. Do not include yourself. |
| Section 9 | Check this box if this affidavit discloses the adoption of a child and you are requesting the court to impound this affidavit. If this provision is applicable, you should contact the Clerk-Magistrate or Register of Probate for assistance concerning the appropriate motion to be filed. |
| Sections 10 & 11 | COMPLETE ONLY IF YOU CHECKED THE BOX IN SECTION 3.
List the present and all prior addresses during the last two years of the child(ren) listed in Section 2 of this affidavit and your present address. If legal custody of a child has been awarded to a social service agency, list the name and address of the agency with legal custody. |
| Signature | The party listed in Section 1 must date and sign this affidavit except for an incompetent person or juvenile, in which case the attorney of record on behalf of the juvenile or incompetent party must date and sign this affidavit and print his/her name and address. |

THIS AFFIDAVIT MUST BE FILED WITH THE COURT AND A COPY FURNISHED BY THE PARTY FILING IT TO ALL OTHER PARTIES TO THE ACTION

IV. UNIFORM RULE REQUIRING DISCLOSURE OF PENDING AND CONCLUDED CARE OR CUSTODY MATTERS

Adopted, Effective November 1, 1983

(Applicable to Boston Municipal, District, Juvenile, Probate and Family and Superior Court Departments)

Upon the filing or issuance of any petition or complaint involving the care or custody of a child pursuant to G.L. c. 119 (except delinquency actions under G.L. c. 119), G.L. c. 201, G.L. c. 208, G.L.c. 209, G.L. c. 209A, G.L. c. 210, or any other provision of law concerning the care or custody of a child, the plaintiff shall file an affidavit. Such affidavit shall contain relevant information concerning such child including, but not limited to, a list of all other known proceedings involving the care or custody of said child which are pending or have been concluded in any court in the Commonwealth of Massachusetts or in any court in any other state or foreign country. All other parties appearing in the action shall likewise file such affidavit. No pleading shall be accepted for filing without such affidavit unless the plaintiff or other party has already filed an affidavit, or unless the court, on written motion for good cause shown, extends the time for filing such affidavit. No such extension shall exceed 30 days. A copy of the affidavit shall be furnished by the plaintiff or other party filing it to all other parties to the action. Upon the discovery of new information subsequent to the filing of such affidavit, the plaintiff or other party shall file a revised affidavit.

The plaintiff shall attach to the affidavit certified copies of each pleading and of any determination entered in any care or custody proceeding which the plaintiff knows of, or has participated in, involving the child in any court in any state other than the

Commonwealth of Massachusetts or in any foreign country, unless the court, on written motion for good cause shown, extends the time for filing such pleadings and determinations. No such extension shall exceed 30 days, unless the court, on written motion for good cause shown, finds an extension in excess of 30 days is warranted. All other parties shall attach to the affidavit certified copies of each pleading and of any determination entered in any care or custody proceeding as required above, unless previously filed by the plaintiff or unless the plaintiff has been granted an extension for filing such pleadings and determinations.

The court, upon written motion of any party, or upon its own motion, may order the impoundment of an affidavit which discloses the adoption of a child. Impounded affidavits shall not be available for public inspection, but shall be available to the court and its employees, attorneys whose appearances are entered in a case, the parties, the Department of Social Services or its licensed adoption agencies, and such other persons whom the court, upon written motion, may permit.

The affidavit shall be on a form prescribed by the Chief Administrative Justice of the Trial Court, which upon its filing, shall be deemed in compliance with the provisions of G.L. c. 209B, the Massachusetts Child Custody Jurisdiction Act.

Amended, effective July 1, 1984.

APPENDIX C

"Reasonable efforts"
judicial certification form
pursuant to G.L. c. 119, s. 29C

DEPARTMENT:

____ DISTRICT COURT
____ JUVENILE COURT
____ PROBATE AND FAMILY COURT

DIVISION: _____

This form is intended for use in meeting the requirements of General Laws c. 119, s. 29C and the federal Adoption Assistance and Child Welfare Act of 1980, Title IV-E of the Social Security Act. The form replaces a form entitled "Federal Financial Participation Form". Its completion will enable the Commonwealth to receive federal financial assistance for foster care.

USE A SEPARATE FORM FOR EACH CHILD

IN RE:

Child's Name

Upon granting of care, custody or responsibility to the Department of Social Services or its agent in accordance with G.L. c. 119, 201, 208, 209A or 210, I determine that:

Yes No N/A

Continuation in the home is contrary to the welfare of the child.

Reasonable efforts have been made prior to the placement of the child to prevent or eliminate the need for removal of the child from his/her home.

Reasonable efforts were made to make it possible for the child to return to his/her parent or guardian.

Date

Justice

APPENDIX D

Uniform Trial Court Rule VI
concerning substitute care review hearings

VI. UNIFORM RULES FOR SUBSTITUTE CARE REVIEW HEARINGS

Adopted, Effective July 1, 1985

RULE 1. SCOPE OF THE RULES

These rules govern the procedure for hearings convened pursuant to G.L. c. 119, § 29B in the Superior, District, Juvenile and Probate and Family Court Departments. Procedures in such actions not governed by these rules shall be governed by the rules of procedure applicable to the court in which the matter is heard.

RULE 2. DEFINITIONS

For the purposes of these rules:

A. "Appropriate Order" means any order of the court which facilitates attainment of the goal set out in a plan for a child in substitute care, reduces delay in attainment of such goal, or establishes a different goal related to the care and custody of said child.

B. "Child in Substitute Care" means any child placed in the care and custody of the Department of Social Services by order of a court of competent jurisdiction, and who is not currently residing with a parent or parents.

C. "Clerk" means a Clerk-Magistrate, Assistant Clerk, Register or Assistant Register of the court where the hearing is convened.

D. "Committing Court" means the court which transferred custody of or committed a child to the Department of Social Services.

E. "Department" means the Department of Social Services.

F. "Hearing" means a hearing convened pursuant to G.L. c. 119, § 29B.

G. "Parent" means a child's biological or adoptive mother or father.

H. "Party" shall include the original parties to the actions, or any party substituted for an original party, but shall not include the parents if the child has been freed for adoption pursuant to paragraph B of G.L. c. 119, § 23 or §§ 2 or 3 of G.L. c. 210.

I. "Plan" means a written document prepared by the Department which shall include the following:

1. a brief legal history;
2. placement history; problem(s) to be resolved to achieve permanent goal;
3. permanent plan goal;

4. services provided in the past or on a continuing basis;

5. services to be provided;

6. reason for placement;

7. type of placement;

8. visitation plan;

9. degree of all parties' compliance with service plan tasks and court orders;

10. results of any internal reviews by the substitute care review unit; and

11. the time for accomplishing the permanent goal.

The Plan may be the Department's service plan prepared in accordance with its regulations if it includes the above criteria. The name and address of the foster parents should be omitted.

RULE 3. PURPOSE

A. The purpose of the hearing shall be:

1. to insure that there is a permanent plan which is in the child's best interests for each child in substitute care by order of court; and

2. to aid in the implementation of such plan.

B. Participation in the hearing shall not constitute a waiver of any rights to a trial on the merits, appeal, review and redetermination or other hearing which a party may have pursuant to G.L. c. 119, G.L. c. 210, G.L. c. 201, or any other rule or provision of law. The hearing pursuant to these rules may be held simultaneously with such trial, appeal, review and redetermination or other hearing.

RULE 4. NOTICE—SUBMISSION OF PLAN

A. No less than sixty (60) days prior to the scheduled hearing date, the clerk's office of the court wherein the hearing is to be convened shall send notice of the hearing to the attorney for the Department. Such notice shall inform the Department of the date, time and location of the hearing and of its obligation to file the Plan timely.

B. If the child has been returned home, adopted, or had a guardian with custody other than the Department or its agent appointed, the Department shall, upon receipt of notice of the hearing, so advise the court in writing and the case shall be removed from the hearing list.

C. If the child is in substitute care, no less than thirty (30) days prior to the scheduled hearing date, the Department shall file the Plan with the clerk's office, and, if so directed in the notice, with the probation office, and send copies to all parties, and advise the court whether the child has been freed for adoption pursuant to paragraph B of G.L. c. 119, § 23 or §§ 2 or 3 of G.L. c. 210.

D. Upon receipt of the Plan, the clerk shall send notice to the petitioner, if different from the Department, to the child's attorney and, unless the child has been freed for adoption, to the parents and their attorney by mailing to their last known addresses. Such notice shall inform the parties of the date, time, and location of the hearing, of their right to counsel, and of the need to file objections pursuant to rule 4E.

E. No less than ten (10) days prior to the scheduled hearing date, any party objecting to the Department's Plan must file with the clerk's office and mail to all parties a statement specifying the provisions to which he/she is objecting and the reasons therefor. Failure to so file will not, when due to excusable neglect or circumstances beyond his/her control, preclude a party from participating in the hearing.

RULE 5. COUNSEL

A. All parties have the right to the presence of counsel.

B. If a party was represented by counsel at trial, that counsel shall continue to represent the party in the hearing until the court permits him/her to withdraw his/her appearance or until an appearance is filed by successor counsel. If trial counsel wishes to withdraw his/her appearance, and if the party has been determined to be indigent, a motion for withdrawal with appointment of successor counsel shall be filed. Any motion under this provision shall be scheduled for hearing no later than seven days after filing.

C. If there is no attorney of record for the child, or if the attorney of record is unavailable, the court shall appoint counsel and send him/her notice as provided in Rule 4D.

D. If there is no attorney of record for the parents, or if the attorney of record is unavailable, and if the parents are entitled to be present at the hearing and are indigent, the court shall appoint counsel to represent them.

RULE 6. PRE-HEARING CONFERENCE

The court may, in its discretion, schedule a pre-hearing conference, the purpose of which will be to frame the issues for the hearing.

RULE 7. THE HEARING

A. Convened by Committing Court

1. The committing court shall convene the hearing within eighteen (18) months of the original transfer of custody or commitment to the Department, and every twelve (12) months thereafter, while the child remains in the care of the Department.

2. Where practical and where there will be no undue delay, the hearing shall be conducted by the judge who entered the original order of commitment.

3. For good cause shown, a party may be granted a continuance of the scheduled hearing.

B. Presence of Parties

All parties with counsel (except the petitioner where different from the Department) shall be present at the hearing, except that counsel for the child may appear without his/her client. Failure of one or more parties to appear shall not preclude the court from proceeding with the hearing.

C. Conduct of the Hearing

The Department shall present its Plan to the court, which Plan shall be admissible. The author shall be available for cross-examination by each of the parties.

RULE 8. ORDERS

A. After hearing the evidence, the court may approve or disapprove the Plan in whole or in part and make any Appropriate Order, including, but not limited to, orders with respect to the child's care or custody.

B. Where the court approves the Department's Plan, it may make such orders as it determines to be appropriate to reduce delay in carrying out such plan.

C. The clerk's office shall forthwith enter such order on the court's docket.

D. The court need not enter written findings absent an appeal from its order.

RULE 9. APPEALS

Any party to the hearing may appeal the court's order to the Appeals Court by filing a claim of appeal in the office of the clerk of the trial court, no later than ten (10) days following the issuance of such order.

APPENDIX E

Interim Supplemental Rules
of Appellate Procedure
in Care and Protection Cases

INTERIM SUPPLEMENTAL RULES OF APPELLATE PROCEDURE IN CARE AND PROTECTION CASES

Adopted, Effective January 23, 1982

Rule

1. Scope.
- 1A. Transitional Rule for Care and Protection Proceedings in Progress on January 23, 1982.
2. Appeal.
 - (a) Entry of Adjudication or Order of Commitment.
 - (b) Notice of Adjudication or Order of Commitment.
 - (c) Claim of Appeal—How and When Taken.
 - (d) Extension of Time for Filing Claim of Appeal.
 - (e) Content of the Claim of Appeal.
 - (f) Change of Counsel on Appeal.
3. Draft Report.
 - (a) Filing of Draft Report: Time Frame.
 - (b) Service of Draft Report on Court and Parties.
 - (c) Contents of the Draft Report.
 - (d) Settling of the Report.
4. Trial Judge's Findings of Fact and Conclusions of Law: Notification by Clerk of Issuance of Findings of Fact and Conclusions of Law.
 - (a) Trial Judge's Findings of Fact and Conclusions of Law.
 - (b) Notification to All Parties by Clerk.
5. Tape Recorded Proceedings.
6. Manner of Service.
7. Record on Appeal.

RULE 1. SCOPE

These rules govern the procedure for appeals from adjudications and orders of commitment in proceedings brought pursuant to M.G.L. c. 119 s. 24. Procedures in such actions that are not prescribed by these rules shall be governed by the Massachusetts Rules of Appellate Procedure.

RULE 1A. TRANSITIONAL RULE FOR CARE AND PROTECTION PROCEEDINGS IN PROGRESS ON JANUARY 23, 1982

1. Any appellate proceeding in which a timely claim of appeal has been filed in the appropriate court prior to January 23, 1982 shall proceed by means of a trial de novo, in accordance with procedures in effect prior to January 23, 1982.
2. Any appellate proceeding in which a timely claim of appeal has not been filed in the appropriate court prior to January 23, 1982 will be governed by these rules pursuant to M.G.L. c. 119 s. 27, as amended by Chapter 715 of the 1981 Massachusetts Acts and Resolves.

RULE 2. APPEAL

(a) **Entry of Adjudication or Order of Commitment.** Upon the trial judge's making an adjudication or issuing an order of commitment, the Clerk shall forthwith enter that adjudication or order on the court's docket.

(b) **Notice of Adjudication or Order of Commitment.** Immediately following the Clerk's entry of the adjudication or order of commitment on the docket the Clerk shall notify all parties by mail of the entry of said adjudication or order of commitment. The Clerk shall note on the docket the names of the persons to whom he/she mails such notice, with the date of the mailing. This notice shall include: (1) a copy of said adjudication or order, (2) the date of the Clerk's entry, and (3) notice that each party has ten (10) days from said date of entry within which to file a claim of appeal, and thirty (30) days from the filing of such claim of appeal within which to file a draft report.

(c) **Claim of Appeal—How and When Taken.** An appeal, as permitted by M.G.L. c. 119 s. 27, as amended by St.1981 c. 715, shall be taken by filing a claim of appeal with the Clerk of the trial court within ten (10) days of the Clerk's entry of the adjudication or order of commitment. Appellant shall also serve a copy thereof on all parties. If a timely claim of appeal is filed by a party, any other party may file a claim of appeal within ten (10) days of the date on which the first claim of appeal was filed. The claim of appeal shall be taken to constitute the "notice of appeal" for purposes of applying the Massachusetts Rules of Appellate Procedure.

(d) **Extension of Time for Filing Claim of Appeal.** Upon a showing of excusable neglect or circumstances beyond the control of the parties, the trial court may extend the time for filing the claim of appeal by any party for a period not to exceed thirty (30) days from the expiration of the time otherwise prescribed by this rule. Such an extension may be granted before or after the time otherwise prescribed by this rule has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the trial court shall deem appropriate.

(e) **Content of the Claim of Appeal.** The claim of appeal shall specify the party or parties taking the appeal and shall designate the adjudication or

order of commitment, or part thereof, appealed from.

(f) Change of Counsel on Appeal. If a party was represented by counsel at trial, that counsel shall continue to represent the party on appeal until the trial court permits him/her to withdraw his appearance and until an appearance is filed by substitute counsel. If trial counsel wishes to withdraw, he/she shall, on the day upon which the notice of appeal is filed, file a motion to withdraw. Any motion under this provision shall be scheduled for hearing no later than seven (7) days after filing. If the motion to withdraw is allowed and the appellant has been determined to be an indigent or indigent but able to contribute, the judge shall follow the procedures for assignment of counsel established in Supreme Judicial Court Rule 3:10.

Amended, effective Sept. 15, 1986.

RULE 3. DRAFT REPORT

(a) Filing of Draft Report: Time Frame. If an appeal is claimed pursuant to M.G.L. c. 119 s. 27, as amended by St.1981 c. 715, the appellant shall file with the Clerk of the trial court a draft report within thirty (30) days of the date of the filing of the claim of appeal.

(b) Service of Draft Report on Court and Parties. A copy of such draft report shall forthwith be mailed by registered mail by the appellant filing the report to the trial justice addressed to him at the court where the case was heard. Service of the draft report by the appellant shall also be made on all other parties.

(c) Contents of the Draft Report. The draft report shall consist of:

(1) the findings of fact and/or rulings of law from which the appellant claims relief in the Appeals Court and any facts essential to a full understanding of the questions of law presented and

(2) a clear and concise statement of the evidence or that portion thereof necessary for appellate review of the issues being appealed.

Such statement of the evidence may be accomplished by incorporating by reference any reports or other materials introduced and accepted in evidence and such offers of proof as may be necessary to raise the issue of erroneous exclusion of evidence.

(d) Settling of the Report. Within ten (10) days after service of the draft report by the appellant any party may file objections or proposed amendments thereto with the Clerk of the trial court. Thereupon the draft report and any objections or proposed amendments thereto shall be submitted by the Clerk to the trial judge for settlement and approval, and the report as settled and approved shall be included by the Clerk of the trial court in the record on appeal. In settling the report, the trial judge may make such additions or modifications as he/she may consider necessary to fully present the issues raised by the appeal. Any party aggrieved by the report as settled and approved shall not be precluded by these rules from seeking such relief, if any, as may otherwise be available.

RULE 4. TRIAL JUDGE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW: NOTIFICATION BY CLERK OF ISSUANCE OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

(a) Trial Judge's Findings of Fact and Conclusions of Law. The trial judge upon making an adjudication or issuing an order of commitment shall file with the Clerk "specific and detailed" findings of fact and conclusions of law to support said order and or adjudication either (a) prior to or (b) within ten (10) days after such order or adjudication. The time for filing the findings of fact and conclusions of law may be extended by application to the Administrative Justice of the appropriate court department, or his designee. If the trial judge is the Administrative Justice, such application may be made to the Chief Administrative Justice of the Trial Court of the Commonwealth.

(b) Notification to All Parties by Clerk. Immediately upon the filing of said findings of fact and conclusions of law the Clerk shall mail a copy to each party in the matter.

RULE 5. TAPE RECORDED PROCEEDINGS

All care and protection proceedings shall be tape recorded.

RULE 6. MANNER OF SERVICE

Service on a party represented by counsel shall be made on counsel.

RULE 7. RECORD ON APPEAL

Assembly of the record on appeal by the Clerk of the trial court, notification to the Appeals Court, transmission of the record on appeal, and all other procedures of appeal shall be in accordance with the

Massachusetts Rules of Appellate Procedure. In addition, the record on appeal as assembled by the Clerk of the trial court shall include the report as well as the trial judge's original findings of fact and conclusions of law.

APPENDIX F

Selected sections of 110 CMR
containing Department of Social Services regulations

2.00: continued

- (a) has a physical or mental impairment which substantially limits one or more of such person's major life activities,
- (b) has a record of such an impairment, or
- (c) is regarded as having such an impairment.

(28) "Incompetent" means determination made by a court, in accordance with M.G.L. c. 201, that an individual does not have the legal power to direct his personal or financial affairs.

(29) "Institutional abuse or neglect" means abuse or neglect which occurs in any facility for children, including but not limited to group homes, residential or public or private schools, hospitals, detention and treatment facilities, family foster care homes, group day care centers, and family day care homes.

(30) "Life-prolonging treatment", as distinguished from live-saving treatment, means intrusive medical treatment where there is no prospect of recovery. In the Matter of Earle A. Spring, 380 Mass. 629, 405 N.E.2d 115, 120 (1980). Recovery does not mean the ability to remain alive but rather life without intolerable suffering. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977).

(31) "Mandated reporters" are defined at M.G.L. c. 119, s. 51A and include: any physician; medical intern; hospital personnel engaged in the examination, care or treatment of persons; medical examiner; psychologist; emergency medical technician; dentist; nurse; chiropractor; podiatrist; osteopath; public or private school teacher; educational administrator; guidance or family counselor; day care worker or any person paid to care for or work with a child in any public or private facility, or home or program funded by the Commonwealth or licensed pursuant to the provisions of chapter 28A, which provides day care or residential services to children; probation officer; clerk/magistrate of the district courts; social worker; foster parent; firefighter; or police officer.

- ** (32) "Mature Child" means a child who is able to understand the circumstances and implications of the situation in which he/she is involved and is able to participate in the decision-making process without excessive anxiety or fear. A child who is fourteen (14) years old or older is presumed to be a mature child. Other relevant sources of law concerning a "mature child" include: [1] M.G.L. c. 119, s. 21 (CHINS); [2] M.G.L. c. 210, s. 2 (adoptions); [3] M.G.L. c. 112, s. 12F (certain medical treatment); [4] M.G.L. c. 4, s. 7 (general age of majority).

(33) "Medical emergency" means any immediately life threatening condition and shall include but is not limited to the below-listed conditions.

- (a) severe, profuse bleeding
- (b) choking, blocked airway
- (c) unconsciousness
- (d) cardiac arrest
- (e) cardio-vascular accident
- (f) any fracture
- (g) extensive burns
- (h) severe cuts
- (i) other similar severe injury
- (j) other sudden signs of serious physical illness
- (k) any condition where delay in treatment will endanger the life, limb or mental well being of the patient. See, M.G.L. c. 112, s. 12F.

Possibility that a disease may deteriorate to an irreversible condition at an uncertain but relatively distant date is not an emergency. See, 104 CMR 2.11(3) and In the Matter of Guardianship of Richard Roe, III, 421 N.E.2d 40, 55; 383 Mass. 415 (1981).

In determining whether a medical emergency exists the relevant time period to be examined begins when the claimed emergency arises, and ends when the individual who seeks to act in the emergency could, with reasonable diligence, obtain parental consent or judicial review, as applicable. See, Roe, at 55.

(34) "Mental health facility" means a public or private facility

4.10: Voluntary Placement Agreements – Execution

Upon the request of one or both parent(s) or parent substitute(s) and when supported by an assessment of the needs of the child which has been conducted by the Department, the Department may agree to provide substitute care for a child. Every voluntary placement into substitute care shall be accomplished by completion of the Department's standard form of Voluntary Placement Agreement, between the parent(s) or parent substitute and the Department.

4.11: Voluntary Placement Agreements – Form

The Department shall utilize a standard form of Voluntary Placement Agreement, as established by the Department. This Voluntary Placement Agreement shall automatically expire after six (6) months, and must be re-executed if the voluntary placement is to be continued. All Voluntary Placement Agreements shall be approved by, and then signed by, a departmental Area Director or Assistant Area Director or his/her designee. The Voluntary Placement Agreement is intended to be a flexible document adaptable to the individual needs and circumstances of the client or family -- thus the standard form may be modified as appropriate, so long as any such modifications are in writing and are approved by both the client and the Department.

4.12: Voluntary Placement Agreements – Termination

(1) Any Voluntary Placement Agreement may be terminated by one or both parent(s) who have legal custody of the child giving written notice to the Department, regardless of which parent has signed the Voluntary Placement Agreement (i.e., if mother signs the Voluntary Placement Agreement, father may terminate it so long as he has some form of legal custody of the child).

(2) In any case where a parent gives notice to the Department terminating a Voluntary Placement Agreement (including but not limited to cases where one parent has signed the agreement and the other parent gives notice to terminate it) the Department shall honor the Agreement for a period of seventy-two (72) hours thereafter. If, during said 72 hour period, the Department determines that the child would be at risk of abuse or neglect if returned home, the Department may institute court proceedings to obtain custody of the child.

* * 4.13: Voluntary Placement Agreements – Mature Child

The Department may accept a Voluntary Placement Agreement from a mature child, without signature of any parent(s). However, such Voluntary Placement Agreements (signed only by the mature child) will only be accepted and honored by the Department for a period of seventy-two (72) hours thereafter. During that 72 hour period, the Department shall notify the parent(s) of the child, verbally or in writing, that the child has signed a Voluntary Placement Agreement with the Department and is in substitute care. During that 72 hour period, parent(s) shall not have the right to revoke or terminate the Voluntary Placement Agreement, nor shall they have the right to know the whereabouts of the child, unless the child specifically agrees and unless the Department determines that to so inform the parent(s) would not be contrary to the child's best interests. At the conclusion of the 72 hour period, the Department shall either return the child to his/her parent(s), or shall institute court proceedings to obtain custody of the child, or shall obtain a Voluntary Placement Agreement signed by the mature child's parent(s).

4.14: Voluntary Placement Agreements – Miscellaneous

In addition to the rights and duties enumerated in the standard form Voluntary Placement Agreement, the Department shall also exercise the following rights:

(1) Interviews of Children: From time to time the Department may receive requests from various sources to allow third parties to interview child(ren). Examples include: media, police officers, district attorneys, other social work professionals (however this regulation does not apply to interviews of children

110 CMR 11.00: MEDICAL AUTHORIZATIONS

Section

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11.01: Introduction

To determine who can consent to medical care, the first determination is whether an emergency exists as defined in 110 CMR 11.03 and 11.14. If it is an emergency, no one's consent is required. If there is no emergency, the question is whether the treatment is routine as defined in 110 CMR 11.04 or extraordinary as identified in 110 CMR 11.11, 11.12, 11.13, 11.14 and 11.15. If the particular treatment is not identified specifically in the regulation, it is necessary to weigh the factors outlined in 110 CMR 11.17 to determine whether the contemplated treatment is extraordinary. If it is not extraordinary, it is routine. There is no other possibility.

If the treatment is routine, DSS may consent. In the case of treatment for drug dependency, pregnancy (except abortion and sterilization), family planning, and treatment for a venereal disease or a disease dangerous to the public health, the consent of the minor is sufficient. If the treatment is extraordinary DSS may never consent, but must obtain parental consent for children in the care of the Department and prior judicial approval for wards and children in the custody of the Department. The terms "emergency", "routine", and "extraordinary" medical treatment are extensively defined in the regulations and only those definitions apply. Neither common parlance nor medical terminology may be used in their place.

11.02: Medical Authorization Definitions

(1) In the Custody of the Department: means a child placed in the Department's custody through court order or through adoption surrender. For purposes of these medical authorization regulations only, this phrase shall also include the period occasioned by an emergency removal pursuant to M.G.L. c. 119, s. 51B between removal and appearance in Court on the next available court date.

(2) In the Care of the Department: means a child receiving services from the Department pursuant to a Voluntary Placement Agreement. For purposes of these medical authorization regulations only, this phrase shall also include the involvement of the Department after the issuance of a mittimus which commits a CHINS child to the custody of the Department, pursuant to a CHINS proceeding. Although the Department has custody of CHINS children and therefore has the power to determine the child's medical care, for purposes of these medical

11.02: continued

authorization regulations, the Department shall be deemed to have delegated back to the parents the power to determine the CHINS child's extraordinary medical care.

11.03: Emergency Medical Care

(1) "Medical emergency" means any immediately life threatening condition and shall include but is not limited to the below-listed conditions.

- (a) severe, profuse bleeding
- (b) choking, blocked airway
- (c) unconsciousness
- (d) cardiac arrest
- (e) cardio-vascular accident
- (f) any fracture
- (g) extensive burns
- (h) severe cuts
- (i) other similar severe injury
- (j) other sudden signs of serious physical illness
- (k) any condition where delay in treatment will endanger the life, limb or mental well being of the patient. See, M.G.L. c. 112, s. 12F.

(2) Possibility that a disease may deteriorate to an irreversible condition at an uncertain but relatively distant date is not an emergency. See, In the Matter of Guardianship of Richard Roe, III, 421 N.E.2d 40, 55; 383 Mass. 415 (1981). In determining whether a medical emergency exists the relevant time period to be examined begins when the claimed emergency arises, and ends when the individual who seeks to act in the emergency could, with reasonable diligence, obtain parental consent or judicial review, as applicable.

(3) Consent. When there is a medical emergency, no one's consent is required in order to allow a child to receive necessary medical care. See, M.G.L. c. 112, s. 12F.

11.04: Routine Medical Care

(1) "Routine medical care" shall include but is not limited to the following:

- (a) Allergy Shots.
- (b) Blood Pressure Test. See, 106 CMR 421.445(J).
- (c) Comprehensive Physical Examination -- documenting the finding of an unclothed physical examination including a complete system review pertinent to the age of the child, fundoscopic examination of the eyes for children over five years of age, and observation of the teeth and gums for children three years of age or older. See, 106 CMR 421.445(D).
- (d) Dental care.
- (e) Developmental Assessment -- the child's current levels of functioning in the below-listed areas, as appropriate to the child's age. See, 106 CMR 421.445(F).
 - 1. gross motor development, including strength, balance, and locomotion
 - 2. fine motor development, including eye-hand coordination
 - 3. language development, including expression, comprehensive and articulation
 - 4. self-help and self-care skills
 - 5. social interaction and emotional development
 - 6. cognitive skills, including problem-solving and reasoning abilities.
- (f) Diseases dangerous to the public health, treatment of. See, M.G.L. c. 112, s. 12F and 105 CMR 300.100.
- (g) Drug dependency treatment. See, M.G.L. c. 112, s. 12E.
- (h) Family planning services. See, 106 CMR 421.401 et. seq.
- (i) Fractures, treatment of
- (j) Hearing Test. See, 106 CMR 421.445(K).
- (k) Immunization - against diphtheria, pertussis, tetanus, measles, poliomyelitis, mumps, rubella and such other communicable diseases as may be specified from time to time by the Department of Public Health. See, M.G.L. c. 76, s. 15 and 105 CMR 220.100.

11.04: continued

- (l) Laboratory tests and special medical studies --when determined by the examining physician to be necessary.
 - (m) Lead Poisoning Test. See, 106 CMR 421.445(P).
 - (n) Nutritional Status Assessment -- the evaluation of the child's nutritional health in light of dietary practice and the entire health assessment (that is, history, physical examination, height and weight measurements, and the laboratory tests) and documentation of any nutritional disturbance or dysfunction. See, 106 CMR 421.445(G).
 - (o) Pelvic Examination. See, 106 CMR 421.445(O).
 - (p) Pregnancy Treatment - except abortion or sterilization. See, M.G.L. c. 112, s. 12F.
 - (q) Preventive health services.
 - (r) Psychiatric assessment, evaluation, or treatment on out-patient basis or up to ninety (90) days on in-patient basis.
 - (s) Treatment - commonly prescribed for a specific physical illness, which treatment does not pose risks of permanent serious side effects or risk of death, See, Custody of a Minor, 375 Mass. 733, 379 N.E.2d 1053, 1064 (1978) or is determined not to be extraordinary medical treatment by using the analysis outlined in these regulations.
 - (t) Tubercular skin test or chest x-ray.
 - (u) Venereal Disease Treatment. See, M.G.L. c. 112, s. 12F; 105 CMR 300.140.
 - (v) Vision Test. See, 106 CMR 421.445(L).
- (2) Consent. The Department may consent to routine medical care for a child in the care of the Department or a child in the custody of the Department or a child who is a ward of the Department.
- (3) Parent's Religious Beliefs Regarding Routine Medical Treatment. If parents refuse to sign a standard Voluntary Placement Agreement because they refuse to delegate to the Department the power to consent to routine medical treatment for their child on the basis that such routine medical treatment conflicts with the parents' sincere religious beliefs, the Department shall elect one of the following actions:
- (a) Amend the standard Voluntary Placement Agreement by adding the following paragraph:
 "Whereas the undersigned parents hold sincere religious beliefs opposed to all medical treatment, the Department shall have the right to approve only medical, psychological and dental care, testing or studies for the child relative to: (i) drug dependency; (ii) diseases dangerous to the public health; (iii) venereal diseases; (iv) emergency medical treatment; and (v) routine physical examination and laboratory test."
 - (b) Determine whether the parents' refusal to delegate to the Department the power to consent to the medical treatment constitutes medical neglect, and if so, institute appropriate court action on that basis.

11.05: Family Planning Services

- (1) "Family Planning Services" means medical, educational and social services, excluding abortion and sterilization, which enable individuals voluntarily to limit family size or plan spacing of children. Family planning services include the below-listed services. See, 106 CMR 269.030(A)(B) and 106 CMR 421.412.
- (a) Information and referral (including outreach & follow-up)
 - (b) Individual and group counseling
 - (c) A physical examination [i] for a female, includes thyroid, breast, heart, abdominal, speculum, pelvic, and rectal examinations, and measurements of height, weight and blood pressure; [ii] for a male, includes thyroid, heart, genital, abdominal, and rectal examinations, and measurements of height, weight and blood pressure. See, 106 CMR 421.412(2).
 - (d) A pap smear for females. See, 106 CMR 421.412(3).
 - (e) Any laboratory test indicated by the child's history or examination. See, 106 CMR 421.412(4).
 - (f) A medically approved method of contraception. See, 106 CMR 421.427(5).

11.05: continued

- (g) Medical examinations, consultations, laboratory tests and contraceptive services rendered by a licensed physician
 - (h) Medical treatment for related conditions, such as venereal diseases or vaginal infections
 - (i) Prescriptions and medical items related to family planning services including drugs, supplies and devices
 - (j) Clinical follow-up
- (2) Provision of Information.
- (a) Department staff shall inform a child in the care or custody of the Department, or a child who is a ward of the Department, about family planning services available to sexually active minors if such child requests this information or if in the judgment of Department staff such child has need for this information. See, 106 CMR 421.401 et. seq.
 - (b) Department staff shall not coerce any child in any way to receive family planning services or to employ any particular method of family planning. A child's use of family planning services must be completely voluntary. See, 106 CMR 421.427(B).
- (3) Consent by Child. Any child who requests family planning services, whether such child is in the care or custody of the Department, or is a ward of the Department, may consent to his/her own medical and laboratory family planning services. The consent of the Department is not necessary in such cases. (See, 106 CMR 421.427(A) which provides that "services must be made available to all recipients who request services, without regard to...age...".)
- (4) Consent by Department or Parent. If the child consents to family planning services but the medical provider insists on parental or Department consent, the Department may consent. If the child is not able to consent, the Department may consent.

11.06: Pregnancy

- (1) Consent By Child. A child who is pregnant or believes herself to be pregnant may give consent to her own medical and dental care (except abortion or sterilization). The consent of the Department is not necessary to authorize medical or dental care for any such child in the care or custody of the Department, or any such ward of the Department. See, M.G.L. c. 112, s. 12F.
- (2) Consent By Department or Parent. If a medical provider refuses to treat a child who is pregnant or believes herself to be pregnant without parental or Department consent, or if such child refuses to consent or is not able to consent to medical or dental care, the Department may consent (except to abortion or sterilization).

11.07: Abortion

- (1) Consent By Child in Care of Department.
 - (a) If a minor in the care of the Department is pregnant both the minor and both of her parents must consent to an abortion, or she must obtain prior judicial approval pursuant to M.G.L. c. 112, s. 12S.
 - (b) If one of the pregnant minor's parents has died or is unavailable to give consent within a reasonable time, consent of the remaining parent shall be sufficient. See, M.G.L. c. 112, s. 12S.
 - (c) If both parents have died or are otherwise unavailable to the physician within a reasonable time, and in a reasonable manner, consent of the minor's guardian or guardians shall be sufficient. See, M.G.L. c. 112, s. 12S.
 - (d) If the pregnant minor's parents are divorced, consent of the parent having custody shall be sufficient. See, M.G.L. c. 112, s. 12S.
 - (e) If one or both of the pregnant minor's parents or guardians refuse to consent to the performance of an abortion or if she elects not to seek the consent of one or both of her parents or guardians, the minor must seek authorization for an abortion from a judge of the Superior Court, pursuant to M.G.L. c. 112, s. 12S.

11.07: continued

(2) Consent By Child in Custody of Department.

(a) If a minor, in the custody of the Department, is pregnant and wants to have an abortion, Department staff shall not consent to the abortion. Such a minor must obtain prior judicial approval pursuant to M.G.L. c. 112, s. 12S.

(b) If the minor requests assistance from the Department in seeking court authorization for an abortion, or if in the judgment of the Department's social work staff such minor has need for this information, the Department social work and legal staff shall provide her with the necessary information on how to go to court to file a petition or motion under the provisions of M.G.L. c. 112, s. 12S. However, Department attorneys shall not represent pregnant minors in their petition or motion pursuant to M.G.L. c. 112, s. 12S.

(3) Consent By Department As Guardian. If a minor is pregnant and wants an abortion, and both her parents have died or are otherwise unavailable to the physician within a reasonable time and in a reasonable manner, and if the Department has been appointed guardian of the minor by a Probate Court, the Department shall follow the requirements and procedures of M.G.L. c. 112, s. 12S.

11.08: Drug Dependency

(1) Consent. A child twelve years of age or older who is found to be drug dependent by two or more physicians may give his/her consent to the furnishing of hospital and medical care related to the diagnosis or treatment of such drug dependency. The consent of the Department is not necessary to authorize hospital or medical care related to drug dependency of any child over twelve years of age in the Department's care or custody, or any child for whom the Department has been appointed guardian. See, M.G.L. c. 112, s. 12E.

(2) Consent By Department Or Parent. If a medical provider refuses to treat a child without parental or Department consent, or if a child refuses to consent or is not able to consent to medical or hospital care related to the diagnosis or treatment of drug dependency, the Department may consent; provided that the Department shall not consent to the administration of antipsychotic medication or shock therapy or any other extraordinary medical treatment for diagnosis or treatment of drug dependency.

11.09: Diseases Dangerous To The Public Health

(1) "Diseases dangerous to the public health" means the following. See, 105 CMR 300.100; 105 CMR 310.020.

- (a) Actinomycosis
- (b) AIDS (Acquired Immune Deficiency Syndrome)
- (c) Animal Bite
- (d) Anthrax
- (e) Brucellosis (Undulant Fever)
- (f) Chickenpox (Varicella)
- (g) Cholera
- (h) Diarrhea of the Newborn
- (i) Diphtheria
- (j) Dysentery, Amebic
- (k) Dysentery, Bacillary (Shigellosis)
- (l) Encephalitis (specify if known)
- (m) Food Poisoning by:
 - 1. Botulism
 - 2. Mushrooms and other poisonous vegetable and animal products
 - 3. Mineral or organic poisons such as arsenic, lead, etc.
 - 4. Staphylococcal
- (n) German Measles (Rubella)
- (o) Glanders
- (p) Hepatitis, Viral (includes Infectious and Serum Hepatitis)
- (q) Impetigo of the Newborn
- (r) Leprosy
- (s) Leptospirosis (including Weil's Disease)

11.09: continued

- (t) Lymphocytic Choriomeningitis
- (u) Malaria
- (v) Measles (Rubeola)
- (w) Meningitis (B. Influenzal, meningococcal, pneumococcal, streptococcal forms)
- (x) Mumps
- (y) Ophthalmia Neonatorum
- (z) Plague
- (aa) Poliomyelitis
- (bb) Psittacosis
- (cc) Rabies - Human
- (dd) Rickettsialpox
- (ee) Rocky Mountain Spotted Fever
- (ff) Salmonellosis (except Typhi and Paratyphi)
- (gg) Salmonellosis: Typhi and Paratyphi (Typhoid and Paratyphoid Fevers)
- (hh) Smallpox (Variola)
- (ii) Smallpox Vaccination Reactions -- Generalized Vaccinia, Eczema Vaccinatum
- (jj) Streptococcal Infections (including Erysipelas Scarlet Fever, Streptococcal Sore Throat, etc.)
- (kk) Tetanus
- (ll) Trachoma
- (mm) Trichinosis
- (nn) Tuberculosis
- (oo) Tularemia
- (pp) Typhus Fever (including Brills' Disease)
- (qq) Whooping Cough (pertussis)
- (rr) Yellow Fever

(2) Consent by Child. If any ward or child in the care or custody of the Department reasonably believes herself or himself to be suffering from or to have come in contact with any disease dangerous to the public health, such child may consent to his or her own medical care or dental care related to the diagnosis or treatment of such disease. The consent of the Department is not necessary to authorize medical or dental care related to the diagnosis or treatment of diseases dangerous to the public health for any ward or child in the Department's care or custody. See, M.G.L. c. 112, s. 12F.

(3) Consent by Department or Parent. If a medical provider refuses to treat the child without parental or Department consent, or if a child refuses to consent or is not able to consent to medical or dental care related to the diagnosis or treatment of a disease dangerous to the public health, the Department may consent.

11.10: Venereal Disease

(1) "Venereal diseases" means the following. See, 105 CMR 300.100; 105 CMR 300.140; 105 CMR 340.100.

- (a) Chancoid
- (b) Gonorrhea
- (c) Granuloma Inguinale
- (d) Lymphogranulom Venereum
- (e) Syphilis

(2) Consent by Child. If any ward of the Department or child in the care or custody of the Department reasonably believes himself or herself to be suffering from or to have come in contact with any venereal disease, such child may consent to his or her own medical care or dental care related to the diagnosis or treatment of such venereal disease. The consent of the Department is not necessary to authorize medical or dental care related to the diagnosis or treatment of venereal disease for any ward or child in DSS care or custody. See, M.G.L. c. 112, s. 12F.

11.10: continued

(3) Consent by Department or Parent. If a medical provider refuses to treat the child without parental or Department consent, or if a child refuses to consent or is not able to consent to medical or dental care related to the diagnosis or treatment of venereal diseases, the Department may consent.

11.11: Sterilization

(1) No Consent By Department. Department staff shall not consent to the sterilization of any ward or child in its care or in its custody. Prior judicial approval is necessary under all circumstances for the performance of a sterilization upon any child who is a ward of the Department, or who is in the care or custody of the Department. See, Matter of Moe, 385 Mass. 555, 559, 432 N.E.2d 712 (1982); M.G.L. c. 112, s. 12W.

11.12: No Code Orders

(1) "No code" order means a medical order regarding a terminally ill patient directing a hospital and its staff not to use heroic medical efforts in the event of cardiac or respiratory failure. Heroic medical efforts include invasive and traumatic life-saving techniques such as intracardial medication, intracardial massage and electric shock treatment. No code orders include "do not resuscitate" orders or orders stated in different language attempting to accomplish substantially the same result as a "no code" order. See, Custody of a Minor, 385 Mass. 697, 434 N.E.2d 601 (1982).

(2) No Consent By Department. Department staff shall not consent to the entry of a "no code" order for any ward or child in its care or custody. See, Custody of a Minor, 434 N.E.2d 601 (1982).

(3) Consent By Parents.

(a) With respect to a child who is in the care of the Department, the right to consent or to refuse to consent to the entry of a "no code" order shall remain with the child's parents, unless otherwise limited by court order. If the Department has

reason to believe that the parents are guilty of medical neglect by their consent to a "no code" order, the Department shall seek custody through a court proceeding which alleges medical neglect.

(b) With respect to a child who is a ward of the Department or is in Department custody, when a medical provider seeks the Department's consent to the entry of a "no code" order, the Department shall not consent unless it seeks and receives prior judicial approval for the entry of a "no code" order, even if the child's biological parents have consented to the entry of such order. See, Custody of a Minor, 434 N.E.2d 601, 608 (1982).

When seeking prior judicial approval, the Department shall file a Motion for Appointment of a Guardian ad Litem to investigate whether such order should enter.

11.13: Life-Prolonging Medical Treatment

(1) "Life-prolonging medical treatment", as distinguished from life-saving treatment, means intrusive medical treatment where there is no prospect of recovery. In the Matter of Earle A. Spring, 380 Mass. 629, 405 N.E.2d 115, 120 (1980). Recovery does not mean the ability to remain alive but rather life without intolerable suffering. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977).

(2) No Consent By Department. Department staff shall not consent to the giving or withholding of life-prolonging medical treatment for any child who is a ward of the Department or for any child in its care or custody. See, Spring, supra; Superintendent of Belchertown State School v. Saikewicz, supra.

(3) Consent By Parents or Court.

(a) With respect to a child who is in the care of the Department, the right to consent or to refuse to consent to the giving or withholding of

11.13: continued

life-prolonging medical treatment shall remain with the child's parents unless otherwise limited by statute or court order. If the Department has reason to believe that the parents are guilty of medical neglect by their consent to giving or withholding of life-prolonging medical treatment, the Department shall seek custody through a court proceeding which alleges medical neglect.

(b) With respect to a child who is a ward of the Department or is in the Department's custody, when a medical provider seeks the Department's consent to an order giving or withholding life-prolonging medical treatment, the Department shall seek prior judicial approval for the giving or withholding of life-prolonging medical treatment, even if the child's biological parents have consented to the entry of such order. When seeking prior judicial approval, the Department shall file a Motion for Appointment of a Guardian ad Litem to investigate whether such order should enter for a ward of the Department or child in the Department's custody.

11.14: Antipsychotic Drugs

(1) "Antipsychotic drugs" shall mean drugs which are used in treating psychoses. Antipsychotic drugs include the below-listed drugs by whatever official name, common or usual name, chemical name, or brand name they may be designated. All isomers, esters, ethers, salts of, or any combination of, drugs listed below are deemed to be antipsychotic drugs. Such antipsychotic drugs shall include, but shall not be limited to:

<u>Generic Name</u>	<u>Trade Name</u>
1 Acetophenazine	Tindal
2 Butaperazine	Repoise
3 Carphenazine	Proketazine
4 Chlorpromazine	Thorazine
5 Chlorprothizene	Taractan
6 Fluphenazine	Prolixin
7 Haloperidol	Haldol
8 Loxapine	Loxitane
9 Mesoridazine	Serentil
10 Molindone	Moban
11 Perphenazine	Trilafon
12 Piperacetezine	Quide
13 Prochlorperazine	Compazine
14 Promazine	Sparine
15 Thioridazine	Mellaril
16 Thiothixene	Navane
17 Trifluoperazine	Stelazine
18 Triflupromazine	Vesprin

(2) No Consent By Department. The Department shall not consent to the administration of antipsychotic medication for any individual, but shall in all cases seek parental consent for children in Department care, or prior judicial approval for children in Department custody and wards of the Department.

(3) Consent by Parents for Children in Department Care.

(a) When any individual, organization, facility or medical provider seeks to medicate with antipsychotic drugs a child, who is in the care of the Department, Department staff shall not consent to such medication nor shall the Department seek prior judicial approval for administration of such medication. The decision of whether to consent to such medication shall remain with the parents.

(b) If the Department has reason to believe that the parents are guilty of medical neglect by their consent to medicate with antipsychotic drugs or by their refusal to consent to medicate with antipsychotic drugs, the Department shall seek custody of the child through a court proceeding which alleges medical neglect.

11.14: continued

(c) The above regulations apply whether or not the child consents to the administration of antipsychotic medication.

(4) Judicial Approval for Wards and Children in Department Custody.

(a) When any individual, organization, facility, or medical provider seeks the Department's consent to medicate with antipsychotic drugs a child, who is a ward of the Department or who is in Department custody, the Department shall seek prior judicial approval for administration of such drugs even if the child's biological parents have consented to the medication. See, Rogers v. Commissioner of the Department of Mental Health, 390 Mass. 489 (1983); M.G.L. c. 210, s. 6.

(b) Where antipsychotic medications have been previously prescribed for a child who is a ward of the Department or who is in the custody of the Department, and that child is currently being treated with antipsychotic drugs without judicial authorization, the Department shall initiate the process for judicial review and application of substituted judgment. Pending judicial review the Department shall not discontinue the prescribed treatment with antipsychotic drugs, because interruption or discontinuance of the treatment might cause severe medical complications and might violate the individual's legal right to treatment.

(c) Neither a ward of the Department who has attained age sixteen nor a child in the custody of the Department who has attained age sixteen, and who has voluntarily admitted him/herself to a mental health facility, shall have the power to consent to the administration of anti-psychotic drugs. The Department shall seek prior judicial approval for medicating such a child with antipsychotic drugs, even if such child consents to its administration. See, M.G.L. c. 201, s. 6.

(5) Guardianship for Individuals Over Age Eighteen.

(a) The Department shall not consent to the administration of antipsychotic drugs to an individual over eighteen years of age who is in the care or custody of the Department.

(b) Any individual over the age of eighteen who is in the care or custody of the Department, and who is competent to make medical decisions, may consent to the administration of his/her antipsychotic medication.

(c) If the Department believes that an individual over the age of eighteen in the care or custody of the Department is not competent to make medical decisions, and failing action by the individual's parents, the Department of Mental Health, or other third person, the Department will file incompetency proceedings under M.G.L. c. 201. If the individual is adjudicated competent, then only such individual may consent to the administration of antipsychotic drugs. If the individual is adjudicated incompetent then the judge will apply a substituted judgment standard to determine whether antipsychotic drugs ought to be administered, and will issue appropriate orders.

(6) Emergency Treatment with Antipsychotic Drugs.

(a) Antipsychotic drugs may be administered for treatment purposes without parental consent or prior judicial approval only in an emergency (even though no threat of violence exists) and only if there is no less intrusive alternative to antipsychotic drugs.

(b) An emergency for purposes of administering antipsychotic drugs for treatment purposes is an unforeseen combination of circumstances or the resulting state that calls for immediate action. See Roe at 42. It includes a situation where doctors, in their professional judgment, determine that the medication is necessary to prevent the immediate, substantial, and irreversible deterioration of a serious mental illness. See Rogers at 511. The possibility that a mental condition might deteriorate into a chronic, irreversible condition at an uncertain but relatively distant date is not an emergency. Roe at 55.

11.14: continued

(c) In situations that fall within the purview of this Regulation, no consent by the Department or parents is necessary (since the medical provider may make such determination) and therefore the Department shall not give consent nor seek parental consent.

(d) If a child is medicated with antipsychotic drugs in an emergency situation and the doctors determine that the antipsychotic drugs should continue, then the Department shall follow the procedures for obtaining consent as though no emergency existed. See, Rogers at 512.

(7) Use of Antipsychotic Drugs for Restraint.

(a) Antipsychotic drugs shall not be administered as a restraint of any ward or child in the care or custody of the Department when such restraint is for disciplinary reasons or for administrative convenience.

(b) Antipsychotic drugs may be used for restraint only in cases of emergency, and only if there is no less intrusive alternative to antipsychotic drugs. An emergency for purposes of administering antipsychotic drugs for restraint is the occurrence of, or serious threat of, extreme violence, personal injury, or attempted suicide. Such emergency cases shall only include situations where there is the occurrence or a substantial risk of serious self-destructive behavior, or the occurrence or a substantial risk of serious physical assault. A substantial risk includes only the serious, imminent threat of bodily harm, where there is present ability to effect such harm. Predictable crises are not within the definition of emergency. Antipsychotic drugs may be administered for restraint only in accordance with the procedures set forth in the Regulations of the Department of Mental Health.

11.15: Electroconvulsive Treatment or ECT ("Shock Treatment")

(1) Consent by Child If Age Sixteen or Older. No person other than the child may consent to ECT if the child is sixteen years of age or older and:

(a) is not a patient at a mental health facility; or

(b) is on voluntary admission status or conditional voluntary admission status to a mental health facility.

(2) Consent by Parents for Children in Department Care.

(a) When any individual, organization, facility or medical provider seeks to administer ECT to a child under sixteen years who is in the care of the Department, the Department shall not consent to such treatment nor shall the Department seek prior judicial approval for administration of such treatment. The decision of whether to consent to ECT shall remain with the parents.

(b) If the Department has reason to believe that the parents are guilty of medical neglect by their consent to ECT or by their refusal to consent to ECT, the Department shall seek custody of the child through a court proceeding which alleges medical neglect.

(c) The above regulations apply to any child under sixteen years of age whether or not the child consents to the administration of ECT.

(3) Judicial Approval for Children in Department Custody.

(a) When any individual, organization, facility or medical provider seeks the Department's consent to administer ECT to a child who is in Department custody, or to a ward of the Department, the Department shall seek prior judicial approval for administration of such treatment, even if the child's biological parents have consented to the ECT.

(b) Where ECT has been previously prescribed for a child in the custody of the Department, and that child is currently being treated with ECT without judicial authorization, the Department shall immediately initiate the process for judicial review and application of substituted judgment. Pending judicial review the Department

11.15: continued

shall not attempt to discontinue the prescribed treatment with ECT, because interruption or discontinuance of the treatment might cause severe medical complications and might violate the child's legal right to treatment.

11.16: Commitment to a Mental Health Facility(1) Definition.

Mental health facility means a public or private facility for the inpatient care or treatment or diagnosis or evaluation of mentally ill or mentally retarded persons, except for the Bridgewater State Hospital. See M.G.L. c. 123, s. 1. Community residential care facilities for children (as defined at 110 CMR 7.120) are not mental health facilities for purposes of 110 CMR 11.00.

(2) Consent By Child If Age Sixteen Or Older. Any child who has attained the age of sixteen may apply for voluntary admission to a mental health facility. In the case of such an application by the child, no additional consent either from the Department or from parents is necessary. See M.G.L. c. 123, s. 10(a).

(3) Consent By Parent. A parent may consent to the admission of his/her child to a mental health facility when:

- (a) the child is in the care of the Department and is under sixteen years of age; or
- (b) the child is in the care of the Department and is between sixteen and eighteen years of age and does not consent to admission to a mental health facility.

(4) Consent By Department Area or Regional Director. The Department (by an Area or Regional Director only) may consent to the admission of a person:

- (a) (custody:) in the custody of the Department
- (b) (care:) in the care of the Department if that person's parent(s) is unavailable for consultation or if that person's parent(s) after consultation consent or authorize the Department to consent; but the Department may not consent to the admission of a person in the care of the Department if that person's parent(s) after consultation refuse to consent or refuse to authorize the Department to consent
- (c) (ward:) who is a ward of the Department only if the Department as guardian has the specific power to consent to the admission of the ward

to a mental health facility for an initial period of time not to exceed a maximum of ninety (90) days.

(5) Judicial Review After 90 Days. In any case where the Department has consented to the admission of a person to a mental health facility, the Department shall seek judicial review before it consents to an extension of the admission of such person to a mental health facility beyond a period of ninety (90) days.

(6) Antipsychotic Drugs. The determination of who may consent to the administration of antipsychotic drugs to a child shall be made according to Section 11.14 of these regulations.

11.17: Other Extraordinary Medical Treatment

(1) Recognizing that it is impossible to itemize every extraordinary medical treatment, the Department shall utilize the following factors to determine whether a medical treatment is extraordinary:

(a) Complexity, risk and novelty of the proposed treatment: The more complex the treatment, the greater the risk of death or serious complications, the more experimental the procedure, then the greater the need to determine that the treatment is extraordinary, and to obtain parental consent or to seek judicial approval prior to authorizing treatment. See, In the Matter of Guardianship of Richard Roe III, 421 N.E.2d 40, 53 (1981). In the Matter of Spring, 405 N.E.2d 115 (1980). In the Matter of Moe, 432 N.E.2d 712 (1982).

(b) Possible side effects: The more serious and permanent the side effect, the greater the need to determine that the treatment is extraordinary, and to obtain parental consent or to seek judicial approval prior to authorizing treatment. See, Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417 (1977). Rogers v. Commissioner of DMH, 390 Mass. 489, 501-502 (1983). In the Matter of Guardianship of Richard Roe III, 421 N.E.2d 40 (1981). Custody of a Minor, 385 Mass. 697, 434 N.E.2d 601 (1982).

(c) Intrusiveness of proposed treatment: The more intrusive the treatment the greater the need to determine that the treatment is extraordinary, and to obtain parental consent or prior judicial approval. See, In the Matter of Hier, 18 Mass. App. Ct. 200, 464 N.E.2d 959, (1984). Superintendent of Belchertown State School v. Saikewicz, supra. In The Matter of Moe, supra. In The Matter of Spring, supra.

(d) Prognosis with and without treatment: The less clear the benefit from the proposed treatment the greater the need for parental consent or prior judicial approval. See, Superintendent of Belchertown State School v. Saikewicz, supra; Custody of a Minor, 385 Mass. 697, 434 N.E.2d 601 (1982); In The Matter of Spring, supra.

(e) Clarity of professional opinion: The more divided the medical opinion, the greater the need for parental consent or prior judicial approval. See, In The Matter of Spring, supra.

(f) Presence or absence of an emergency: In a medical emergency a physician can act without anyone's consent. See, M.G.L. c. 112, s. 12F.

(g) Prior judicial involvement: if a court has been involved in past medical decisions, this argues for judicial involvement in any future medical treatment decision, but this is not conclusive. See, In The Matter of Guardianship of Richard Roe III, supra at 56.

(h) Conflicting Interests: Where the interests of the decision maker conflict with the interests of the child, there is greater need for obtaining parental consent or prior judicial approval. In the Matter of Guardianship of Richard Roe III, 421 N.E.2d 40 (1981).

(2) No Consent By Department. The Department shall not give its consent to extraordinary medical treatment for any child in the care or

11.17: continued

custody of the Department. For all such children, the Department shall seek prior judicial approval for any extraordinary medical treatment (unless parental consent is obtained for children in the care of the Department, as set forth at (3) below).

(3) Consent By Parent. With respect to a child in the care of the Department, the right to consent to extraordinary medical treatment shall remain with the parent(s), except to the extent such right has been specifically limited by the legislature or by the rulings of a court or by written agreement between the parents and the Department.

(4) Guardianship. The Department shall not give its consent to extraordinary medical treatment for its ward, except where it is specifically empowered to do so by statute, regulation or case law. In all other cases the Department shall seek prior judicial approval for extraordinary medical treatment.

11.18: Legal Proceedings

(1) Whenever the Department may not consent to a medical procedure, but must seek prior judicial approval for such procedure, the Department shall seek the appointment of a guardian ad litem to investigate whether such procedure should be administered, and thereafter report back to the court.

(2) At any subsequent hearing when the court is considering the question of whether such treatment ought to be administered, the Department shall not request that the court authorize the Department to consent to such treatment; but rather the Department shall request that the court, using a substituted judgment standard, make the decision whether to authorize such treatment.

11.19: Autopsy

For children in the care of the Department at the time of their death, the right to consent or refuse to consent to an autopsy belongs to the parent(s). The Department shall not consent to an autopsy for children who die in the care of the Department, unless the Department, after diligent efforts, is unable to contact the parent(s) to seek their consent, in which case the Department may then consent.

For wards or children in the custody of the Department at the time of their death, the Department shall request and shall consent to an autopsy.

11.20: Burial

Burial of wards or children in the care or custody of the Department at the time of their death shall be accomplished by consulting with the parents, in the first instance. If the parents refuse to make burial arrangements or cannot be contacted, the Department shall make and pay for appropriate burial arrangements, consistent with the provisions of M.G.L. c. 119, s. 23(H).

11.21: Organ Donation

For children in the care of the Department at the time of their death, the right to consent or refuse to consent to a request for organ donation after the child's death belongs to the parent(s). The Department shall not consent to organ donation by children who die in the care of the Department.

For wards or children in the custody of the Department at the time of their death, the Department shall determine on a case-by-case basis whether to consent to a request for organ donation.

11.22: Confidentiality of Medical Records and Information

(1) Except for cases in litigation (in which case 110 CMR 12.09 shall govern), with respect to the medical records of a child in the care or custody of the Department or a child who is a ward of the Department:

(a) The Department shall not distribute or release medical documents or information contained anywhere in a child's record or case file to any unauthorized person (as defined at paragraph (3) herein) without the written consent of one of the child's parents or without an order of a court of competent jurisdiction.

(b) The child's parent(s) or attorney or guardian or guardian ad litem shall have access to all medical documents or information contained anywhere in a child's record or case file; unless the person who contributed such information has requested in writing to the Department that the information not be disclosed (for which purpose the mere stamp "Confidential" shall not be sufficient), or unless otherwise provided by statute. The child's parent(s) may also request medical documents regarding their child directly from the hospital or medical provider pursuant to the provisions of the "Patient's Bill of Rights" at M.G.L. c. 111, s. 70E.

(2) With respect to the medical records of a child surrendered for adoption to the Department or in the custody of the Department after an adjudication under M.G.L. c. 210, s. 3:

(a) The Department shall not distribute or release information in a child's medical record to any unauthorized person without court order.

(b) Unauthorized person for purposes of this section (2) shall include the parents of the child.

(3) Unauthorized person for purposes of sections (1) and (2) shall include everyone except: the child's physician or any other medical provider, the child's foster parents, the appropriate authorities at a residential facility in which the child is or is intended to be living, the appropriate authorities at any school the child is attending, the child's substitute care provider, the subject child if over fourteen years of age, or any other person who the Department determines requires such information to render medical or other professional assistance to the subject child.

(4) When any ward or child in the care or custody of the Department requests that the Department not notify his or her parents of intended medical treatment, the Department shall determine on a case-by-case basis whether to consent to the child's request, but shall comply with the provisions of M.G.L. c. 112, s. 12F.

11.23: Children as Research Subjects

Parents shall retain the right to consent to participation by their child in any medical or psychological research. If the parents consent, the Department shall also consent. If the parents refuse to consent, the child shall not participate. Medical research includes physical examinations, laboratory tests of any kind, and psychological examinations and tests. For children in the custody of the Department pursuant to a surrender for adoption, termination of parental rights, or where parents cannot be located, the Department shall seek prior judicial approval.

11.24: Consent Standard

In all cases where the Department has the right to consent to medical care for a ward or a child in its care or in its custody, the Department shall consider exclusively what will serve the child's best interests.

REGULATORY AUTHORITY

110 CMR 11.00: M.G.L. c. 112, s. 12;
M.G.L. c. 201;
M.G.L. c. 123, s. 10;
M.G.L. c. 119, s. 23(H).

APPENDIX G

Informational Memorandum
regarding the consolidation of cases

Informational Memorandum

[Consolidation of Cases]

Pursuant to G.L., Chapter 211B, Section 9, the Chief Administrative Justice of the Trial Court is authorized to assign a justice appointed to any Department of the Trial Court to sit in any other Department of the Trial Court for such period or periods of time as will best promote the speedy dispatch of judicial business.

The assignments may authorize a justice to sit simultaneously as a justice of several Departments to reduce delay and duplication in actions pending in the Trial Court.

To more easily identify those situations where an assignment would further the expeditious processing of cases the following procedures are established. As used herein, the term "party(ies)" shall mean the attorney of record for a party, if represented by counsel, or if the party is not represented by counsel, the party acting *pro se*.

1. Where two or more actions are pending in different Departments of the Trial Court, and where a Justice, Clerk-Magistrate, Register, or party determines that the separate actions are related actions involving substantially the same or similar issues, the Justice, Clerk-Magistrate, Register or party may request that an appropriate interdepartmental assignment be made by the Chief Administrative Justice so that one justice may hear all related matters. The requests should be directed to the Administrative Justice of each Department in which the related actions are pending.

2. Where a request for an interdepartmental assignment is made by a party(ies), the request is to be in the form of a letter to the Administrative Justices of the Departments in which the actions are pending. The letter should identify by title and docket number each of the related cases; list all parties and counsel of record; briefly describe the nature of the cases, and include a statement of reasons why the separate actions are deemed related and an interdepartmental assignment would be appropriate. Every request must be accompanied by a copy of the current docket entries in the related cases.

A party making a request pursuant to this paragraph shall at the same time send a copy of such request to all parties in the related cases and,

if a case has been specially assigned, to the trial Justice. Any party opposing the request will have seven days from receipt of the request to submit to the Administrative Justices of the respective Departments a letter in opposition with a statement of the reasons therefor.

3. Factors to be considered in determining that actions are related are: whether the actions involve the same parties and the same attorneys; whether the actions involve common questions of law and fact, and whether the witnesses and the evidence to be presented in the separate actions will be the same or similar.

4. The Administrative Justices will review the requests and any letters in opposition to determine whether the cases are related and whether the efficient administration of judicial business would be served by having the several actions heard by one judge. The Administrative Justices will then forward the request, any letters in opposition, and their recommendations, to the Chief Administrative Justice.

5. The Chief Administrative Justice will review the request and the recommendations of the Administrative Justices, and where the interests of the Trial Court and of the parties would be served thereby, may make an appropriate order of assignment which would allow one justice to hear the related actions. The Chief Administrative Justice will notify the Administrative Justices and all parties of his decision on each request.

6. Notwithstanding, the Chief Administrative Justice may make such assignments in the absence of a request by a Justice, Clerk-Magistrate, Register or party.

APPENDIX H

New Uniform Practices of
Probate Courts:
Practices X, Xa and Xb

X. PLAN OF ADOPTION REQUIRED IN PETITIONS TO ESTABLISH CONSENT

In an uncontested adoption, filed pursuant to Chapter 210, Section 3, requiring the submission of a plan, the Department of Public Welfare or other agency shall submit to the judge, at the time of presentation of the petition for allowance, a written report consisting of:

1. Report on biological parents and summary of the agency's history with the child.
2. The agency's plan for the child upon the release of the required parental consent. A plan that elaborates in detail what steps the agency plans to employ to find a suitable adoptive parent may be deemed sufficient without further specificity.

Amended Dec. 14, 1979, effective Jan. 28, 1980.

Xa. TRACKING SYSTEM AND PROCEDURES FOR TERMINATION PETITIONS FILED PURSUANT TO M.G.L. CH. 210, SEC. 3

1. The justices in each division shall have overall supervision of the tracking of Ch. 210, sec. 3 petitions and related adoption matters. One person in the registry shall be designated in consultation with the register as having primary responsibility for maintenance of the system. A backup person, also familiar with the system, shall be designated.

2. The following shall be maintained in each division:

A. A chronological list of petitions filed which shall serve as an inventory of pending cases.

B. A calendar showing return dates for all Ch. 210, sec. 3 petitions.

3. Notice shall be provided as follows:

A. If the present address of the parents is known, notice shall be given by delivering a copy of the citation to each of the parents at least fourteen days before the return day. Service shall be made by the sheriff or deputy sheriff, unless the court otherwise orders.

B. If no present address of the parents is known, either within or without of the commonwealth, by

(i) mailing, postpaid, a copy of the citation to the last known address of each of the parents at least fourteen days before the return day, and

(ii) publishing a copy thereof in accordance with the terms of the order of notice, the final publication to appear no later than seven days before the return day.

C. If the exact whereabouts of a parent cannot be ascertained personal service shall be attempted, but service by mail and publication shall

be commenced simultaneously to avoid delay in case personal service cannot be made.

As used herein, the term "parent" shall include an unwed father or mother.

Upon motion made by any party who is eligible to file a petition under Ch. 210, sec. 3, or upon the court's own motion, the court may, in its discretion, limit or dispense with the notice required by this practice.

4. Each week a list of termination cases returnable the following week shall be prepared, and any not presented for allowance by the end of the return day shall be set aside. A notice shall be sent to D.S.S. or the private agency filing the petition in all uncontested cases to notify them that the Return of Service must be filed and a plan filed in the case.

5. If the matter is uncontested, the court should notify the petitioners within fourteen (14) days after the return day and require presentation of the petition with an adoption plan within thirty (30) days after the return day. (See U.P. X concerning adoption plans.)

6. If the case appears to be contested, by virtue of an appearance or otherwise, the court shall appoint counsel for a parent or other interested party, if indigent. See: Department of Public Welfare v. J.K.B., 393 N.E.2d 406 (1979).

7. If the petition is contested by any party, counsel and/or a Guardian ad Litem may be appointed to represent the best interests of the child. The G.A.L. shall file a report within thirty (30) days, unless the court approves otherwise.

8. All contested termination cases shall be pre-tried. The cases shall be given priority status for pre-trial hearings and trials on the merits. A date shall be set for pre-trial within sixty (60) days after the return day for all contested petitions. All parties are required to be present with counsel at the pre-trial.

9. Should a party not be present at the pre-trial, the court in its discretion may entertain and act on the petition and enter a decree, if appropriate.

10. Trial on contested petitions shall be scheduled no later than sixty (60) days from the date of the pre-trial, but sooner if possible, in the discretion of the court.

11. Decrees and findings should be entered by the court within thirty (30) days after the completion of the trial, if possible.

12. The decree in both contested and uncontested petitions shall include a date certain before which the adoption is to be finalized. This date shall be six (6) months from the date of the decree if the child is in the prospective home at the time of its allowance; otherwise one (1) year from the date of

the decree if the plan specifies the child's special needs.

13. The tracking clerk shall periodically compare the allowed terminations with the allowed adoptions and advise the court of the cases where no adoption decree has been entered.

If any child is not adopted within the period specified above, the petitioner shall return to court and show cause why the termination decree should not be vacated. Upon a showing that it would be in the child's best interests to extend the decree, the court shall extend the decree for a determinate length of time.

The court may, *sua sponte*, also order counsel to attend a conference on those cases where no adoption has been entered.

14. All adoption agencies shall advise the court by letter within thirty (30) days when a child is adopted outside the division where the termination petition was granted, and this fact shall be noted on the docket.

15. If a Ch. 210, sec. 3 petition is appealed, the appeals clerk in the division shall notify the justice who entered the decree. The appeals clerk shall review the status of all such appeals at the end of each month and shall advise the justices of their status.

Particular note should be taken of those matters in which the assembly of the record is being delayed due to the absence of transcripts, and corrective action should be taken.

16. The Department of Social Services will submit a status report on its pending cases to the court on a quarterly basis. The tracking clerk shall compare the report to the court records to maintain an up-to-date inventory of terminations pending and allowed terminations awaiting adoption.

Adopted, effective Oct. 1, 1982.

**Xb. TRACKING SYSTEM AND PROCEDURES
FOR PETITIONS FILED PURSUANT TO
M.G.L. CH. 119 SEC. 23(c) AND CH. 201 SEC.
5 BY THE DEPARTMENT OF SOCIAL SER-
VICES OR OTHER CHILD WELFARE
AGENCY**

1. The justices in each division shall have overall supervision of the tracking of Ch. 119 sec. 23(c) and 201 Sec. 5 petitions filed by the Department of Social Services or other child welfare agency. One person in the registry shall be designated in consultation with the register as having primary responsibility for maintenance of the system. Another person, also familiar with the system, shall be designated to be available as needed.

2. The following shall be maintained in each division:

A. A chronological list of petitions filed which shall serve as an inventory of pending cases.

B. A calendar showing return dates for all Chapter 119 sec. 23(c) and 201 sec. 5 petitions filed by the Department or other child welfare agency.

3. Notice of hearings shall be given in the form and manner as prescribed by applicable statute or rule of court. See Probate Rules 6 and 8.

4. Each week a list of the cases returnable the following week shall be prepared, and any not presented for allowance by the end of the return day shall be noted. A notice shall be sent to D.S.S. or the child welfare agency filing the petition in all uncontested cases to notify them that the Return of Service must be filed.

5. If the matter is uncontested, the court shall notify the petitioners within fourteen (14) days after the return day and require presentation of the petition with the current service plan within thirty (30) days after the return day.

6. If the case appears to be contested, by virtue of an appearance or otherwise, the court shall appoint counsel for the child(ren) and the parent, guardian or custodian of such child(ren), if indigent.

7. The court may appoint a Guardian ad litem. The G.A.L. shall file a report within thirty (30) days unless the court approves otherwise.

8. All contested cases shall be pretried. These cases shall be given priority status for pre-trial hearings and trials on the merits. A pre-trial conference shall be held within sixty (60) days after the return day for all contested petitions. All parties are required to be present with counsel at the pre-trial.

9. Should a party not be present at pre-trial, the court may entertain the petition and enter an order or judgment.

10. Trial on contested petitions shall be held no later than sixty (60) days after the pre-trial unless the court shall otherwise order.

11. Decrees, orders and findings shall be entered by the court within thirty (30) days after the completion of the trial.

12. If an appeal is claimed, the appeals clerk in the division shall notify the justice who entered the order. The trial court appeals clerk (or an alternate person) shall review the status of all such appeals at the end of each month and shall advise each justice of the status of his or her cases.

Particular note should be taken of those matters in which the assembly of the record is being delayed due to the absence of transcripts, and corrective action should be taken.

Adopted, effective Dec. 1, 1984.

APPENDIX I

Selected findings of fact and
orders for judgment from various
stages of care and protection proceedings:

Case 1 - Emergency hearing

Case 2 - a) Evidence submitted by stipulation
at trial (judgment later affirmed
on appeal)
b) Case reheard on review and
redetermination

Case 3 - Termination of visitation

Case 4 - Adjudication by stipulation; DSS
ordered to proceed in specified manner

Case 5 - a) Supplementary findings and order
based on post-trial events
(judgment later affirmed
on appeal)
b) Case reheard on review and
redetermination

Case 6 - Adjudication and commitment after
trial (findings later upheld
on appeal)

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

MIDDLESEX, ss.

MARLBOROUGH DIVISION
DIST. CT. DEPARTMENT
C&P NO. of 1987

IN RE:

J S
d/o/b/
T S
d/o/b/
M S
d/o/b/

DECISION AND ORDER

The Department of Social Services has petitioned this court for an emergency order under ch.119s.24 seeking custody of the three children named above.

Based upon testimony presented at the preliminary hearing I find the following facts.

The Department of Social Services received a report under ch. 119 s.51A alleging the youngest child had been sexually abused by the mother. This report was received yesterday. The Department of Social Services took the child to be examined. The doctor reported a slight laceration in vagina of the two year old child and an opening larger than normal for a child of that age. Mother agreed to place the child in foster care.

Today the oldest child reported to his teacher that he too has been touched in his privates by his mother and his father. He prefaced this by saying he knew why his little sister had

been placed in foster care and he wanted to be placed in foster care too. He didn't want to go home.

Based upon all of the facts and the conclusions to be drawn therefrom at said preliminary hearing held at 4:15 p.m. on Thursday, July 16, 1987, I was satisfied that there was reasonable cause to believe that the children were in immediate danger of serious abuse or neglect and that immediate removal of the children from their mother was necessary to protect them. I granted custody of said children to the Department of Social Services until 1:00 p.m. on July 17, 1987 at which time further hearing was to be held to determine if such custody should continue or the children should be returned to their mother.

Prior to said hearing the parties agreed that the custody order entered by the court should continue to Wednesday July 22, 1987 at 1:00 p.m.

By the Court,

Robert A. Belmonte, J.

Date:

(NOTE: Judgment affirmed on appeal; see Care and Protection of Two Minors, 22 Mass. App. Ct. 1114, 497 N.E. 2d 656 (1986).)

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

CP NO.

IN THE MATTER OF THE
CARE AND PROTECTION OF

██████████ AND

██████████

)
)
)
)
)
)
)

FINDINGS OF FACT

AND

ORDER FOR JUDGMENT

When the case was called for trial all parties were present and represented. The parties stipulated that the case would be submitted to the court based on various reports listed in the stipulation and no witnesses were called. I have reviewed all of the evidence which the parties have put before me and I am satisfied that that evidence is sufficient to permit me to make a decision in this matter. Because this is essentially in the nature of a case stated there seems to be little need to review the facts as extensively as might otherwise be necessary.

The background of the parties, how the father and mother of the children came to meet each other, marry, the adoption of the two children who are the subject of these petitions are reviewed in a number of the reports. These facts are not in dispute so I will not repeat them in these findings.

The central issue disputed by the parties is whether or not the father of the children was guilty of sexual abuse of one or both of the children. He steadfastly denies any inappropriate sexual contact with the children. Counselors interviewing the child ██████████ report her describing her

father ejaculating on her on at least one occasion. Her description of the event or events is so graphic as to justify great weight being given it. There is also substantial evidence that she was penetrated either anally, vaginally, or both, either by her father's penis or finger. I credit that evidence and find that on at least one occasion and in all likelihood more than one occasion he was guilty of rape of his daughter [REDACTED].

As to the child [REDACTED] I find no evidence of sexual abuse in the physical sense. However, I find that his conduct with both children in such situations as the three of them being nude and in the steambath together was inappropriately sexually provocative. This is not to say that nudity per se is inappropriate but that the situation in which this nude bathing took place was sexually provocative and inappropriate.

As to both children they are in need of protection from sexual exploitation by their father.

As to the mother there has been admittedly inappropriate physical abuse of one or both children. It seems clear that the mother recognizes the inappropriateness of this conduct and I am satisfied that with appropriate involvement by the Department of Social Services the children will not be at future risk of physical harm. As to the father it is clear that both children love him and he is an important positive force in their lives despite his sexual misconduct.

I find that as to the father, [REDACTED], the children [REDACTED] and [REDACTED] are in need of care and protection and that [REDACTED] has by his sexual abuse of the children demonstrated a profound deficiency as a parent exploiting them for his own sexual gratification.

As to the mother, [REDACTED], I do not find that the children are in need of care and protection.

ORDER FOR JUDGMENT


It is ordered that judgment issue adjudicating the children to be in need of care and protection as to their father [REDACTED] but not as to their mother [REDACTED].

DISPOSITION

It is ordered that the children remain in therapy, until discharged, or further order of this Court; that they be in the custody of their mother; that the father not be permitted to visit the children except in a supervised setting which assures that the children will never be left alone with him or exposed to the risk of further sexual exploitation.

September 5, 1985

Date

A handwritten signature in dark ink, appearing to read 'Lewis L. Whitman', written over a horizontal line.

Lewis L. Whitman
Justice

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

DISTRICT COURT DEPARTMENT
QUINCY DIVISION
CP NO. [REDACTED] and [REDACTED]

CARE and PROTECTION

of

[REDACTED] and
[REDACTED]
[REDACTED]

MEMORANDUM OF DECISION
FINDINGS OF FACT, RULINGS OF LAW
AND ORDER FOR JUDGMENT
on
REVIEW and REDETERMINATION

The standard for review is set forth in Custody of a Minor, 13 Mass. App. 66, 430 N.E 2nd 840 (1982) and Custody of a Minor (No. 2), 22 Mass. App. Ct. 91 (1986). While there must be new findings with respect to current parental unfitness the review does not start with a blank sheet but builds upon findings made in earlier stages of the case. The facts that have been litigated are not to be relitigated. "The proper focus of inquiry on a § 26 review is on those facts which have undergone some metamorphosis since the previous order or are newly developed, and in consequence, alter the relationship between the biological parent and the child." id at 94. Further it is not

necessary that there be a material change in circumstance before the custodial arrangement is altered and even the lack of change in circumstance may be a sound basis for altering the court's order.

In the hearing for review and redetermination it may be said that the father, the moving party, offered no evidence which would affirmatively support a change in the custodial relationship. Indeed, virtually all the evidence offered by the father was addressed at relitigating issues which had been originally litigated and determined.

The principal testimony offered by the father was from two psychiatrists, both outstanding men, and their opinions are worthy of much weight. However, their opinions were predicated on the proposition that the children had not been sexually abused by [REDACTED]. I have found the contrary. Dr. [REDACTED]'s final opinion in response to a question put by counsel for the children, was that if the events took place, as I have found they did, then the children would be at risk with [REDACTED] so long as he does not have treatment.

While Dr. [REDACTED] did not reach that conclusion quite as explicitly as Dr. [REDACTED], he certainly said his other

conclusions and opinions would be totally vitiated if the abuse had indeed taken place, even though his opinion was that it did not happen.

Since the previous order there has been no positive change in circumstances. To the contrary, the father has refused to participate in any counseling or treatment and has pursued a position with respect to visitation which is inimicable to the best interest of the children.

He insisted upon taking the children to a house where they obviously did not wish to go and where they evidenced real fright. Instead of being willing to recognize the fears of the children and show sufficient flexibility to arrange some other visiting location he rigidly insisted that the location would be the one he determined. He also adamantly refused to provide the social worker who had the obligation to supervise the visits with information in advance as to the situs of proposed visitation. This refusal continued through the time of the hearing.

While there has been no change of circumstances this is an opportunity to address the other aspect of the father's position dealing with visitation. When I made my original decision a year ago, I felt that it was important that he

play a role in the development of the children. My concern was that the children be protected from sexual exploitation and that so long as that was done, they should be permitted to interact as much, and as appropriately, as possible. It is, of course, very important that they participate with their extended family consistent with their being protected. That will require both the cooperation of the agency involved, Catholic Charitable Bureau, and Mr. [REDACTED]. If Mr. [REDACTED] is offended by the reasonable restrictions placed by the agency on visitation supervised by other people then there will not be visitation supervised by other people. I will look to the agency to be primarily responsible to see that supervision is proper and safe and that, quite properly, will require that Mr. [REDACTED] communicate with the agency. The conduct of Catholic Charitable Bureau in that regard has been appropriate and responsible. I would hope that there will be the cooperation by Mr. [REDACTED] that will permit as much interaction as possible by the children in the extended family and participation in important family events. Particularly in light of the fact that the children have very little family in this country other than Mr. [REDACTED]'s family, visitation with his family is all the more important.

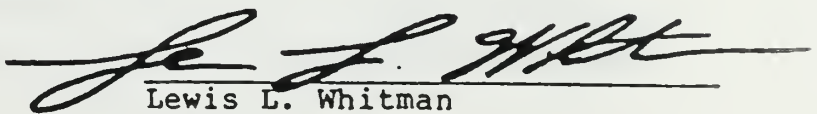
Mr. [REDACTED] should be told when the children are participating in events such as plays, spectator sports and the like. His attendance will not expose the children to any risk as long as he conducts himself properly and recognizes that he may not be with the children in an unsupervised context.

Hopefully there will be more visitation, and it will be less restrictive; but less restrictive does not mean less supervision. Less restrictive does not mean not knowing in advance where the visit will take place and exercising the judgment to say it may not take place in that location, should it be inappropriate. In that sense I am vesting rather substantial discretion in the agency, I think for good reason, and believe it is able to deal with that discretion. If there are specific problems with specific visitation I will tailor further orders and I will take applications for further orders on short notice, if necessary, before or after the usual court hours.

ORDER

The petition for Review and Redetermination of the findings and orders of December 5, 1985 is denied.

November 28, 1986
Date


Lewis L. Whitman
Justice

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

DISTRICT COURT DEPARTMENT
QUINCY DIVISION
C & P. NOS. [REDACTED] and [REDACTED]IN THE MATTER OF THE
CARE AND PROTECTION OF[REDACTED] and
[REDACTED]FINDINGS OF FACT, RULINGS AND ORDER
WITH RESPECT TO VISITATIONFINDINGS OF FACT

After full hearing which occupied an entire trial day and at which the petitioner, Catholic Charitable Bureau of the Archdiocese of Boston, Inc. (CCB), the parents, and the children, were represented by counsel and testimony was received from two experienced social workers who observed the parents in their visits with the children, from the pediatrician appointed by the court as its medical consultant in this case, and from the father of the children, I make the following findings of fact.

Since the discharge of the children from the hospital there have been four supervised visits by the parents with the children. The two social workers who testified describe

the children as being terrified by the parents during the visits. I credit that testimony. I find that the visits demonstrated a profound inability of the parents to recognize the needs of the children and further demonstrated that the children do not relate in any positive way with the parents. The children came to the visits happy and seemingly well-adjusted. During the visits they cowered, screamed and cried and were generally terrorized. After the visits were completed and the parents left the children were stabilized and resumed a reasonable demeanor although their general conduct, and this is particularly true of the older child, [REDACTED], demonstrated significant regression.

The children when they came into care showed evidence of severe neglect to the extent of being life-threatening. This neglect was while they were in the care of the parents. Since their hospitalization and foster placement the children have begun to make some progress but they remain very fragile emotionally and physically. The parents, particularly the mother, in addition to insensitivity to the children's emotional needs showed no sensitivity at all to the children's immunological deficiencies and dealt with the feeding bottle in a manner which exposed the children to the risk of infection.

The visits with the parents are harmful to the children and result in stress which severely inhibits their development. Not only are the visits not helpful they are positively harmful.

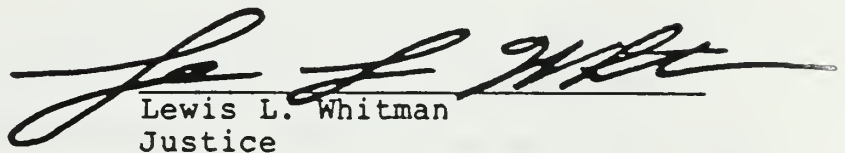
RULING

I rule that the children are entitled to be protected from the harm which flows from visits with their parents and that therefore the visits should be terminated.

ORDER

Until further order of the court, there shall be no parental visits with the children, [REDACTED] and [REDACTED].

July 30, 1987
Date


Lewis L. Whitman
Justice

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS

DISTRICT COURT DEPARTMENT
QUINCY DIVISION
CARE AND PROTECTION
NOS. [REDACTED] and [REDACTED]IN THE MATTER OF THE
CARE AND PROTECTION OF[REDACTED] C & P NO. [REDACTED]
and

[REDACTED] C & P NO. [REDACTED]

FINDINGS OF FACT, RULINGS OF LAW
AND
ORDER FOR JUDGMENT

When this case was reached for trial the parties offered the Court a Stipulation for Adjudication and each of the parties then rested. Based on the stipulation both parents are unfit to parent and the children are in need of care and protection.

It would seem, however, that I have an independent responsibility to satisfy myself that the parents are unfit and that the children are in need of care and protection. Because the matter is being submitted to me by stipulation the findings will be quite abbreviated. However, that does not reflect either any inadequacy of the evidence or any lack of careful consideration on my part. Should there be a

need whether by reason of an appeal or any subsequent proceeding, I will expand these findings and rulings.

As to the father, he is quite clearly very seriously mentally ill and continues to decompensate. He is a patient at Medfield State Hospital and is diagnosed as psychotic. It is overwhelmingly clear that he is unable, at the present time, and for the foreseeable future to provide for the care of the children.

The situation with respect to the mother is less clear. While she has stipulated to the finding and in my colloquy with her seemed content to permit adjudication, her position with respect to the investigator was, at least, equivocal. The principle basis for a finding that the children are in need of care and protection as to their mother relates to a perceived failure on her part to provide care for them. When her husband was well enough and lived at home, he provided day to day care for the children while the mother worked. While she is said to be too self-centered and unwilling to play a meaningful role in the care of the children and also said to lack parenting skills, she asserts a willingness to care for the children if assistance is provided. It is most troubling that the alternative of

foster care is seen preferable to providing day care, and whatever in-home services might be necessary to permit the children to remain with their mother. This is particularly troubling given the report of the conditions in which the children are living in foster care. See page 14 of the investigators report: "...[redacted] and [redacted] share a 'bedroom' with four other girls in a lower level of the home that appeared once to be a family room. There was a strong odor of urine and the six beds (including one bunkbed) afforded no privacy and very little space for the children. [redacted] showed me her bed. I asked her who occupied the bed next to her and she stated a twenty-two year old. The bedroom did not meet OFC or DSS regulations for foster homes."

Further, the mother has offered an alternative plan for the placement of the children. That is, that [redacted] go to live with her sister in Hong Kong and that then she would be able to care for [redacted]. There is no indication whatever that the Department has investigated the reasonableness of this suggestion.

ORDER FOR JUDGMENT

It is ordered for judgment that the children [redacted] and [redacted] be adjudicated in need of care and protection.

It is further ordered that the Department of Social Services provide necessary services to the parents, particularly the mother, and the children which are calculated to reunite the children with their mother as soon as possible. To this end, in the absence of any affirmative reason to the contrary, there shall be as much visitation with the mother, including overnight visits and weekends as the mother's circumstances permit. Further, the Department shall develop a plan which will permit the children to return to their mother by the funding of appropriate day care and by providing homemaker assistance, if necessary.

It is further ordered that the Department will immediately assure that the children are housed in safe, and decent facilities and not what appears to be an overcrowded basement room.

For the moment, the Department shall not pursue adoption plans but shall work towards reunification.

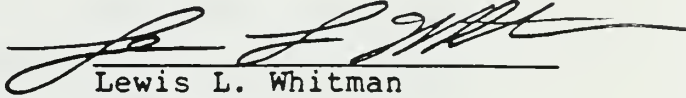
To the issue of Catholic parochial education for the children, that educational placement may continue only if it is consistent with the wishes of the mother.

In general, the mother of the children is to be permitted to, and encouraged to, play a more assertive role

in the care and placement of the children and her concerns about their health, including allergies, is to be given substantial deference.

In addition, the Department will provide those services contemplated by Paragraph 6 of the Stipulation for Adjudication.

February 2, 1987
Date


Lewis L. Whitman
Justice

(NOTE: Judgment affirmed on appeal in unpublished CASE 5(a)
opinion under Appeal Court Rule 1:28; see Care and
Protection of Molly, 22 Mass. App. Ct. 1116 (1988).)

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

DISTRICT COURT DEPARTMENT
DEDHAM DIVISION
DOCKET NO. JV [REDACTED]
QUINCY DIVISION
DOCKET NOS. CP [REDACTED], [REDACTED]
and [REDACTED]

IN THE MATTERS OF THE
CARE AND PROTECTION OF
[REDACTED] AND THE
CARE AND PROTECTION OF
[REDACTED] AND [REDACTED]

SUPPLEMENTARY FINDINGS OF FACT AND ORDER

When the trial in this matter concluded among the orders I made was an order directing that the department place a homemaker, preferably one with training in childrens protective matters, in the [REDACTED] household as soon as possible. Specific directions were provided as to the role that the homemaker should assume. The trial concluded on Thursday March 14, 1985 and a homemaker was in the home on March 18. The homemaker found such appalling conditions that she filed a report under the provisions of General Laws Chapter 119, section 51A. The department reacting to that report and its statutory mandate came before me ex parte, on Monday afternoon and requested that the children present in the home be immediately taken into custody. Based on the testimony given me, ex parte, the department was ordered to take the children into immediate custody.

The following afternoon Mrs. [REDACTED], through counsel, requested a hearing. At that time counsel for the department was available but no witnesses were available

nor were counsel for the children or counsel for the father. It was subsequently agreed that the time for hearing would be set for Thursday, March 21, and the hearing was held on that date.

At the commencement of the hearing I indicated to the parties that my findings in the case-in-chief had been completed before Monday afternoon and that they were in the process of being typed.

I have determined it best that the findings I make with respect to this hearing not be included in the case-in-chief and except for editorial changes and other drafting revisions I have not incorporated the evidence received either ex parte or in the hearing on March 21 in my findings in the case-in-chief. The orders which were drafted prior to the ex parte hearing, but not typed or filed until after the subsequent hearing are set out in the Findings of Fact, Rulings of Law and Orders for Judgment in order to preserve the record in good form.

FINDINGS OF FACT

The homemaker found the [REDACTED] home in a vile and filthy condition, with virtually no food, and with the children, [REDACTED] and [REDACTED] in a filthy condition. Mrs. [REDACTED] during the time the homemaker was present did

virtually nothing to care for the children. She permitted them to be exposed to danger within the home and although this danger was called to her attention by the homemaker she took no steps to remedy the condition. The homemaker, who had no previous knowledge of the case, and indeed did not even know that there was a protective service issue when she arrived, observed that [REDACTED] was quick to go to the homemaker cuddle next to her and accept warmth while she interacted not at all with Mrs. [REDACTED]. The only words which Mrs. [REDACTED] spoke to [REDACTED] were angry shouts. When [REDACTED] vomited and was crying Mrs. [REDACTED] neither attempted to clean or comfort her but left that to the homemaker. The observations by the person new to the situation was, again, strikingly similar to the observations of virtually everyone connected with the [REDACTED]'s over the past five or six years.

Most troubling, however, was the indication that [REDACTED] may have been subjected to sexual abuse. She was, for that reason, seen at Children's Hospital. Testimony was received from the child psychiatrist who was one of the members of the team who saw her at the hospital.

When, as part of the examination, an attempt was made to remove [REDACTED]'s diaper she became hysterical and the examination could not continue. The reaction was totally inappropriate and it was concluded that she should

be sedated so that a gynecological examination could proceed.

Specimens were taken which were tested and revealed the presence of semen in the introitus. No opinion could be offered as to how long the semen had been present other than it had to have been within three days of the time the sample was collected.

The psychiatric examination of [REDACTED] was conducted before the laboratory report had been received.

The psychiatric interview used anatomically accurate dolls. [REDACTED] first took the female doll undressed her, spread its legs and looked at the genital area. The doctor opined that this was highly suggestive of sexual abuse. The doctor told her that he had been told she had been hurt in her "pee pee" she said "yes", the doctor asked who hurt her and her response was "my daddy". When asked with what she said "his finger". Later in the interview with the male doll the doctor pointed to the penis and asked her if anyone had touched her with this. She said "yes, my daddy," and also that her father had touched [REDACTED] with his "beebie" she would not say more but later in the interview took the male doll and held it against her own genital area. The doctor opined that this was also indicative of sexual abuse.

In the doctors opinion there was no doubt that

[REDACTED] was sexually abused and that it would be dangerous for her to return home. It was also his opinion that any child in that home is at risk including the nine month old child.

I credit the opinions of the doctor and I am satisfied that [REDACTED] was raped by her father and at least one other adult male; that this took place while the child was in the care of Mrs. [REDACTED], at a time when Mr. [REDACTED] was not to be in the home; and that Mrs. [REDACTED] either knew and acquiesced in these rapes or was unable to take any effective action to protect [REDACTED].

It is apparent to me that so long as the children are in the care of Mrs. [REDACTED] they are exposed to the very real danger of sexual abuse and that even short visits within the home place the children at risk.

ORDER


Because it is unlikely that Mrs. [REDACTED] will ever be in a position to assure the protection of any of the children from sexual abuse, let alone have the capacity to provide any parenting, no useful purpose would seem to be served by prolonging the children in foster care. The department is therefore directed to develop a service plan which addresses the needs of the children. In completing that service plan, I would expect that the department will

see that [REDACTED] and [REDACTED] are appropriately evaluated and that they receive appropriate treatment. I would also expect the department will see that an evaluation with respect to placement will address the issue of whether the three siblings should be kept together or whether they should be separated, particularly taking into account the aggression which [REDACTED] has shown towards [REDACTED] and recognizing the greater difficulty in his placement and the placement of of three children in a single family.

The service plan, with recommendations should be filed within 45 days. In the development of the service plan counsel for the children should be kept advised on a reasonably regular basis.

There is to be no visitation by the natural parents or the maternal grandmother until further order. It is contemplated that if there is to be visitation it will be only after an appropriate plan for visitation has been approved by the court which assures that the children will be protected from abuse and that any visits will be beneficial, and not harmful, to each of the children.

March 27, 1985
Date


Lewis L. Whitman
Justice

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

DISTRICT COURT DEPARTMENT
QUINCY DIVISION

JV [REDACTED]

C & P [REDACTED], C & P [REDACTED] and
C & P [REDACTED]IN THE MATTERS OF THE
CARE AND PROTECTION OF[REDACTED], [REDACTED]
[REDACTED], [REDACTED]
AND [REDACTED]FINDINGS OF FACT, RULINGS OF LAW
AND
ORDER FOR JUDGMENTIN THE MATTER OF REVIEW AND REDETERMINATION

The standard for review is set forth in Custody of a Minor, 13 Mass. App. 66, 430 N.E. 2d 840 (1982) and Custody of a Minor (No. 2), 22 Mass. App. Ct. 91 (1986). While there must be new findings with respect to current parental unfitness the review does not start with a blank sheet but builds upon findings made in earlier stages of the case. The facts that have been litigated are not to be relitigated. "The proper focus of inquiry on a § 26 review is on those facts which have undergone some metamorphosis since the previous order or are newly developed, and in consequence, alter the relationship between the biological

parent and the child." id at 94. Further it is not necessary that there be a material change in circumstance before the custodial arrangement is altered and even the lack of change in circumstance may be a sound basis for altering the court's order.

[REDACTED] ([REDACTED]) has not demonstrated that in fact there is a change that warrants redetermination of the findings and orders in this case.

The most obvious change in [REDACTED]'s life is that she is now married to a person who is quite obviously rather a different sort of person than [REDACTED]. [REDACTED] ([REDACTED]) certainly presents himself as a reasonable and responsible individual which is a marked contrast to [REDACTED]. While this bodes well for [REDACTED] in terms of her life situation, there is no indication at this stage of a change in her or in her ability to interact positively with the children.

It should first be said that we know nothing of [REDACTED] other than what was offered in this hearing for review and redetermination. His service record and his own testimony is adequate for me to reach some tentative conclusions concerning him, however, the department has not had an

opportunity, nor has the court, to conduct an investigation as would normally be the case with respect to anyone in a custodial situation. To the extent that the children were in need of care and protection with respect to [REDACTED] because of her inability to protect the children against abuse, the presence of [REDACTED] in the household would seem to suggest that there is now someone who is able to provide [REDACTED] with those emotional supports which would permit her to protect the children and also create a situation where the children are less likely to be exposed to dangers of abuse. Protection from abuse was not, however, the only basis for the decision in this case.

While the distant future bodes well the present does not seem to justify a change.

There is a shadow issue of the pending petition to dispense with consent to adopt (G.L. c. 210 § 3). The Department suggests that the action of [REDACTED] in this hearing for Review and Redetermination, as well as some of the visits which preceded it, are aimed at affecting in some way the case in the Probate Court. In truth, it cannot be said that that is inappropriate and I will not fault her for attempting to use every reasonable means to regain custody

of her children. The same may be said with respect to the involvement of a press photographer in at least one of the visits. To the extent that [REDACTED] saw this as a means to bring direct or indirect pressure on the Department, and possibly the court, she cannot in my view be faulted. However, to the extent that the visit attended by the news photographer differed in its quality from visits preceding and subsequent to that visit, the involvement of the news photographer simply becomes relevant on the issue of how representative that particular visit was. It is striking that in that visit [REDACTED] seemed to know how to conduct herself, actively involving herself in playing with the children rather than simply being very passively present with them and barely interacting with them. I find some merit and reason for optimism in all this in that it would seem to demonstrate that she knows how she should conduct herself and it would be hoped that she could consistently conduct herself in that fashion in future visits although apparently she has not done so.

The goal of [REDACTED] in this present hearing is a modest one. She is not seeking to have the judgment that the children are in need of care and protection redetermined and custody returned to her; she is seeking simply an expansion


of visitation to include visitation in the home. In the normal course of events that would seem to be rather a reasonable request. If the children are to be reunited there would have to be some transition home. However, as to [REDACTED] there is no present basis to conclude that there is any change of circumstance or any present likelihood of reunification.

As to the other three children there is at least some possibility of reunification. However, the pending 210 case does play a part in this decision. If the children are to be placed back in the home, if only for visits, this makes a very important statement to them. One which cannot be ignored. If the 210 proceeding results in termination of parental rights then it would be very upsetting for the children to be placed in the home and then removed again. If the 210 case does not result in termination of parental rights with respect to any of the children and if a time comes when [REDACTED] has demonstrated that her interaction with the children becomes a positive one then it would seem appropriate to begin to expand the day visits, and with the involvement of psychologist or other counselor, to begin to introduce [REDACTED] to the children and to the visits. If this goes well then it would be possible to consider home visits.

ORDER

That the petition for Review and Redetermination be denied and that all existing orders shall continue in force.

January 21, 1987
Date


Lewis L. Whitman
Justice

(NOTE: Findings upheld on appeal. See Custody of Two Minors, 396 Mass. 610, 487 N.E. 2d 1358 (1986).)

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

DISTRICT COURT DEPARTMENT
QUINCY DIVISION
JUVENILE # 00202

IN RE CUSTODY OF
TWO MINORS

**FINDINGS, RULINGS,
AND ORDER**

Introduction

This is a petition brought by a social worker as representative of the Commonwealth's Department of Social Services (the Department) pursuant to G.L. c. 119, sections 24 - 26 seeking custody. Counsel for the children were appointed and for each parent. The original petition was filed on April 14, 1981, temporary custody having been awarded to the Department by Kramer, J. The original temporary order of custody provided for "liberal visitation". Thereafter the case was continued from time to time by agreement of the parties, with temporary legal custody remaining with the Department. It appears an investigator was appointed (although

there is no reference in the papers to this fact). After several pretrial discovery orders, hearings got underway on August 24, 1982, were continued for the taking of further evidence on September 28, 1982 and the final evidence taken on October 18, 1982. Neither parent testified. Request for Rulings have been filed in behalf of the parents, a proposed Custody Order in behalf of the children and Requests for Rulings in behalf of the Department.

Findings of the Court

1. [REDACTED] was born on September 17, 1949, and is the mother of [REDACTED] and [REDACTED].
2. [REDACTED] was born on September 17, 1951, and is the father of [REDACTED] and [REDACTED].
3. [REDACTED] and [REDACTED] were married on September 27, 1975.
4. [REDACTED] was born on January 1, 1976.
5. [REDACTED] was born on February 13, 1981.
6. On April 20, 1976, [REDACTED], then less than five months old, was brought to the emergency ward of the Quincy City Hospital, the father reporting "person holding baby on couch fell over taking baby with - baby struck head on floor".
7. On June 21, 1976, an officer of the Quincy Police Department arrived at the [REDACTED] home following a report of an

injured baby and discovered [REDACTED] (five and one half months old) lying in his crib with blood around his mouth. Mr. [REDACTED] admitted that he had hit the baby to make him stop crying.

8. On June 21, 1976, [REDACTED] was brought to the emergency room of the Quincy City Hospital with a lacerated frenulum of his upper lip. The record quoted the mother, [REDACTED], as stating "patient was slapped on hard by his father prior to arrival because he was crying".

9. On June 26, 1976, Mr. and Mrs. [REDACTED] voluntarily signed [REDACTED] into the care of the Department of Social Services (then Department of Public Welfare) and [REDACTED] was placed with a paternal aunt. He was returned to his parents one and one half months later.

10. The Department of Social Services and its predecessor agency offered and provided support services for the [REDACTED] family since 1976, including parenting instruction, foster care, weekly meetings with the [REDACTED] family as a couple and individually, referral to The First Program at South Shore Mental Health, day care for [REDACTED], referral to the Squantum pre-school for [REDACTED] and budget counseling for the parents.

11. In March, 1976, there was an incident when [REDACTED] was scalded while being bathed.

11a. A psychiatric diagnosis of [REDACTED] on October 4, 1976, characterized the family life-style as "chaotic" and defined Mrs. [REDACTED] reality testing as arguably impaired. On psychological testing at that time she was described by the psychometrician as a "disturbed, primitive (sic) and phobic actor-outer, who has not developed adequate ego resources to cope with her feelings and conflicts".

12. There were no documented instances of possible abuse over the next two years.

13. In 1978, the family was referred to The First Program, an infant stimulation program sponsored by the South Shore Mental Health Association.

14. In August of 1978, a social worker filed a "51-A" notice (see G.L. c. 119, section 51A). It was alleged that [REDACTED] sustained a bruised cheek at the hands of his father.

15. The South Shore Mental Health Center has been in contact with the [REDACTED] off and on since 1976. The bulk of its records were admitted in evidence as Exhibit 3. However, the Exhibit contains some significant omissions, in particular letters written by Mrs. [REDACTED] to her therapists to communicate when not in face to face contact where she exhibited paucity of speech. All examiners noted an inhibition of self-expression.

16. In January of 1981, a report of abuse and neglect was filed by a social worker at the Squantum pre-school where ██████ attended. It alleged that ██████ came to school with a "healed round burn on his right eyelid, over the cornea". ██████ had stated that he fell onto his mother's cigarette. ██████ also stated that his parents had had an argument at home and that his father had thrown his mother across the room.

17. In February of 1981, a report of abuse and neglect was filed by the same social worker from the Squantum pre-school. It alleged that ██████ had come to school with third degree burns on his hands and chest. Mrs. ██████ had allegedly sent a note to school explaining that ██████ had been playing by the stove and was burned by a pot of boiling macaroni.

18. On March 25, 1981, at 5:00 A.M., Quincy Police were called to the ██████ home due to a domestic disturbance. Upon arriving the officers observed Mr. ██████ holding Mrs. ██████ down on the couch. Mr. ██████ stated that his wife had said that she was going to throw the five week old infant out the window. Mr. ██████ ran from the house when questioned by the police and was later apprehended.

19. On April 13, 1981, Frank Graney, a social worker with the Department of Social Services, responded to an emergency at the ██████ home. While there he observed a large swollen

bruise on Mrs. [REDACTED] right cheek. Mrs. [REDACTED] told Mr. Graney that her husband had hit her with a closed fist. She also reported that she had a lump on the back of her head explaining that Mr. [REDACTED] had banged her head against the headboard of the bed. Mrs. [REDACTED] also admitted threatening to throw the baby out the window, but explained that this threat was made in an attempt to prevent Mr. [REDACTED] from striking her.

19a. During the first week of April, 1981, a social worker at the pre-school reported that [REDACTED] told her of further threats by Mrs. [REDACTED] to kill the baby.

20. The children were placed in foster care on April 13, 1981, as a result of the emergency care and protection petition filed by Mr. Graney.

21. [REDACTED] was returned home on May 8, 1981, and [REDACTED] was scheduled to return home several weeks later.

22. [REDACTED] was removed from the [REDACTED] home again on June 15, 1981, after Mr. [REDACTED] became violent at a family cookout, and injured [REDACTED]. [REDACTED] was placed with [REDACTED] mother, Mrs. [REDACTED], at this time.

23. [REDACTED] has never been returned home because of concerns by the [REDACTED]' therapist and Department of Social Services' social worker that the [REDACTED] would be overwhelmed.

24. Since April 14, 1981, the Department of Social Services

has offered and provided extensive services: foster care for the [REDACTED] children, weekly play therapy for [REDACTED], Mrs. [REDACTED] and [REDACTED] have been engaged in the First Program at South Shore Mental Health Center, Mr. and Mrs. [REDACTED] are engaged in weekly individual therapy, Mr. and Mrs. [REDACTED] are engaged in weekly couples' therapy, referrals were made to the Family Development Clinic and weekly expressive therapy for [REDACTED] ^{MOTHER} at the Wollaston II Program.

25. Mr. and Mrs. [REDACTED] have been attending therapy programs at South Shore Mental Health since July of 1978.

26. During the time the children have been out of the [REDACTED] home, the [REDACTED] have been working at their marital relationship and have been better able to stabilize the home environment.

27. The [REDACTED] react to stress by employing violence. Mr. [REDACTED] has physically abused Mrs. [REDACTED] and [REDACTED] when under stress and Mrs. [REDACTED] has threatened to throw [REDACTED] out the window.

28. The return of the children will cause stress in the [REDACTED] relationship and carries a strong potential of leading to further violence.

29. [REDACTED] has many emotional problems as a result of the violence he has witnessed in the home as well as the violence that has been directed toward him.

30. [REDACTED] is a very aggressive child which experts say stems from fear. He does not view his environment as safe. He cannot control his impulses and has a poor self image.

31. [REDACTED] has an intense approach-avoidance conflict in which he feels responsible for his parents and wants to take care of them (the approach), but at the same time avoids and rejects his parents by not wanting to be with them at visits (the avoidance). He instead chooses to play outside and has told Karen Lawrence, the social worker from the Department of Social Services, on several occasions, that he does not want to go back home because his father "may get sick again" and because he doesn't want "to get thrown off the porch".

32. [REDACTED] needs a stable home environment and psychotherapy so he may learn to trust, to control his impulses and develop a worthwhile view of himself.

33. [REDACTED] has sustained many physical injuries from his father's violent outbursts. He also sustained several physical injuries as a result of parents' inability to control him and set limits. Such injuries include severe burns from a pot of boiling macaroni and cigarette burns.

33a. In June, 1981, [REDACTED] had a temper outburst, struck [REDACTED] and was assaultive towards his wife. A treating physician (Exhibit 4) believed his prescription of valium

may have been a contributing factor.

34. The parents have attempted to cooperate with many of the programs made available to them (although the husband has refused homemaker services). Both on a conscious level, at least, evince appropriate reactions to loss of their custodial rights. On the other hand [REDACTED] has consistently experienced grave difficulty in controlling [REDACTED] and essentially yielded the boy up to the excessive discipline of his father. By early 1982, the parents had been making such progress and benefitting so markedly from the various programs being offered that a consensus was developing among the concerned therapists looking toward return of the children to the physical custody of the parents. (As early as June 2, 1981, the investigator appointed by the court concluded that [REDACTED] should be in the physical and legal custody of his parents (although he recommended that [REDACTED] remain in her foster placement in custody of the Department). The investigator found the mother unable to cope effectively, despite her good intentions, with the task of managing both children.) However, according to Donna Freedman, the family therapist who worked with Mrs. [REDACTED] from April of 1981 to early April, 1982, Mrs. [REDACTED] wrote a letter expressing concern about the prospect of return of the children. It was not the first such letter. It contained innuendoes of self-

destruction and harm to the children. The letter is now missing. Mrs. [REDACTED] did not deny writing it. She often expressed herself through letters to her therapist. In the opinion of Freedman, return of the children now would undermine the gains that the couple has realized.

35. During a supervised visit of September 30, 1981, it was apparent to a social worker that rough play between [REDACTED] ^{father} and [REDACTED] got out of hand.

36. After unsupervised visits in November, 1981, [REDACTED] complained of being hit. His father admitted doing so because of the boy's misbehavior.

37. On December 24, 1981, and January 20, 1982, during unsupervised visits of [REDACTED] with his parents, a social worker found [REDACTED] playing in the street by himself.

38. [REDACTED] foster parents, with whom the boy has a good relationship, observe negative reactions after [REDACTED] has visited his parents.

39. In July, 1982, [REDACTED], en route to a home visit, said he did not want to go home, was afraid his father would get "sick" and that he would be "thrown off the porch".

40. In the opinion of the Department's social worker Lawrence, continued foster care for each child is appropriate. Her service plan would contemplate adoption for each of the children.

41. Dr. Helene L. Pelligrew, a psychologist with the Judge Baker Guidance Center, evaluated the [REDACTED] family in March and April of 1982. [REDACTED] himself had been severely abused by his father and came from a family where aggressive behavior was the dominant mode of expression. Her findings were consistent with a diagnostic evaluation of [REDACTED] done on April 24, 1979, which found he "has a long history of impulse control (sic) and exhibited self-destructive behavior when frustrated". The other findings raise legitimate concern about his capacity to be a competent parent by reason of history, repeated loss of control, poor judgment (he came to interview "intoxicated and high"), prone to anger. Positive attributes were that he can be a warm and caring person capable of developing a relationship with a therapist. His low IQ may indicate a learning disability (he is illiterate) secondary to organic disease. Absent that, he would be classifiable as an anti-social personality.

42. The Court adopts the opinion of Dr. Anne Solomon, a psychologist with the Children's Hospital Medical Center, that [REDACTED] needs an emotionally stable home environment with nurturance. He cannot receive that in the home of his parents.

43. Experts involved with the [REDACTED] along with the [REDACTED] therapist cannot give a time frame for when the [REDACTED] will be better able to cope with the stress and violence that occurs when

the children are home.

44. Mr. [REDACTED] stated that he does not see a need for therapy any longer. He does not understand the seriousness of the family's proclivity for violence.

45. Returning the children to the [REDACTED] will negatively effect the gains Mr. and Mrs. [REDACTED] have made in their own relationship.

46. [REDACTED] has many emotional problems as a result of the violence he has witnessed in the home as well as the violence that has been directed toward him.

47. The [REDACTED] cannot meet the needs of [REDACTED] and [REDACTED] because their own needs prevail.

48. [REDACTED] and [REDACTED] are currently unfit to assume parental responsibility for their children.

49. [REDACTED] and [REDACTED] are in need of care and protection.

50. Since violent family episodes have been occurring for at least the six years during which the Department of Social Services has been involved with the [REDACTED] and because a time frame cannot be offered for when, if ever, the [REDACTED] will be able to parent their children, a permanent plan is needed for [REDACTED] and [REDACTED] to ensure that they receive a stable living situation.

51. From the failure of either parent to testify the Court

infers they are not able or willing to express themselves as capable of giving the love and care their children need. (Expressed as a ruling of law, "the failure of a party to take the stand in his own behalf is an implied admission that he has a weak case," Liacos, Handbook of Massachusetts Evidence, p. 283.)

Rulings of Law

1. It was appropriate for the foster parent to testify in this case, even to the point of expressing an interest in the adoption of [REDACTED], although the foster parent has no "standing" to seek such adoption. See Adoption of A Minor, 386 Mass. 741, 747 (1982). See Care and Protection of Two Minors, Mass. App. Ct. Adv. Sh. (1981) 1094, 1095.

2. With respect to the child, [REDACTED], the Court has a right and duty to exercise a preventive and prognostic role. Custody of A Minor (No. 1), 377 Mass. 876, 883 (1979).

3. In this case the legal concept of parental unfitness may be understood to mean a poverty of capacity regardless of intention, as well as "parental behavior which adversely affects the child". (Quoted from Bezio v. Patenaude, 1980 Mass. Adv. Sh. 2133, 2148.)

4. The petitioner has sustained its burden of proof by clear and convincing evidence whether or not it was required to meet such a standard. Compare Custody of A Minor (No. 2), 378 Mass. 712,

720-722 (1979) with Santosky v. Kramer, 102 Sup. Ct. 1388, 50 U.S.L.W. 4333 (1982). See also Adoption of A Minor, 386 Mass. 741, 747, fn. 8 (1982). See also Petition of the Department of Social Services to Dispense with Consent to Adoption, 15 Mass. App. Ct. 916 (1983); Petition of the Department of Social Services to Dispense with Consent to Adoption, 15 Mass. App. Ct. 161 (1983).

Order

Pursuant to G.L. c. 119, section 26, [REDACTED] and [REDACTED] are committed to the custody of the Department of Social Services.

Further Rulings

Action on the requests for rulings filed by counsel for the parents is as follows: The Court does not act on 1 - 16, and 18 as they seek findings of fact. Request No. 17 is allowed. Request No. 19 is denied on the basis of the facts found.

The Court denies, without prejudice, at this time, the proposed Order, pending promulgation of a full service plan by the Department in accordance with its applicable regulation.

Entered February 9 ; 1983

Lawrence D. Shubow
Lawrence D. Shubow
Justice

